TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y., PLAINTIFF IN ERROR,

vs.

THE BUFFALO GERMAN INSURANCE COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED OCTOBER 21, 1902.

(18,706.)

a STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

To the judges of the Supreme Court of the United States:

The judges of the court of appeals of the State of New York, in compliance with the writ of error issued herein, do hereby make return thereto in the case of The Buffalo German Insurance Co., respondent, *vs.* The Third National Bank of Buffalo, appellant.

Seal Court of Appeals, State of New York.

In witness whereof I have hereunto set my hand and affixed the official seal of the court at the city of Albany, this twenty-ninth day of September, A. D., one thousand nine hundred and two.

W. H. SHANKLAND, *Clerk.*

b Court of Appeals, State of New York.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

Appeal Book.

Hickman & Palmer, attorneys for respondent, 3 German Ins. Co.'s bldg., Buffalo, N. Y.

Lewis & Lewis, attorneys for appellant, 23–25 Erie Co. Sav. Bank building, Buffalo, N. Y.

c *Statement Required by Rule* 41.

This claim was commenced by the service of the summons and complaint on October 17th, 1896. The answer of the defendant was served November 11, 1896, and its amended answer December, 18, 1896. The names of the original parties in full were The Buffalo German Insurance Company against The Third National Bank of Buffalo. This action was tried before Hon. Truman C. White, justice, at equity term, January 22, 1897, and was decided in favor of the defendant; an opinion was written by the justice. The case was thereafter argued on an appeal to the appellate division, fourth department, which affirmed the judgment of the court below. An opinion was written by Mr. Justice Adams and is reported in 29 Appellate Division, at page 137. The case was thereafter argued on appeal to the court of appeals and the judgment reversed, and the case sent back for a new trial. An opinion was written therein by Justice Gray and is reported in 162 N. Y. at page 168. The case was again tried before Justice Lambert, at equity term, on the 25th day of April, 1900, and judgment awarded to the plaintiff. There was no opinion written by Justice Lambert. The case was there-

after argued on an appeal to the appellate division, fourth department, which affirmed the judgment of the court below. There has been no change in parties.

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } ss.:

Loran L. Lewis, Jr., being duly sworn, says: That he is one of the attorneys for the defendant herein; that no opinion was given by the trial court at the last trial herein to deponent's knowledge and belief. That no opinion was given herein by the appellate division upon the last argument of the appeal to deponent's knowledge or belief.

LORAN L. LEWIS, JR.

Sworn to before me November 30, 1901.

JOHN J. PRICE,
Com. of Deeds, Buffalo, N. Y.

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Supreme Court, County of Erie.

THE BUFFALO GERMAN INSURANCE COMPANY }
against
THIRD NATIONAL BANK OF BUFFALO. }

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of Erie.

Dated this 16th day of October, 1896.

HICKMAN & PALMER,
Plaintiff's Attorneys.

Office and post-office address, 3 German Ins. Co.'s bldg., Buffalo, N. Y.

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Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY }
against
THIRD NATIONAL BANK OF BUFFALO. }

The plaintiff above named, by Hickman & Palmer, its attorneys, complains of the defendant above named, and for its cause of action alleges:

That at all the times hereinafter mentioned, the plaintiff was, and now is, a domestic corporation, created, existing and doing business under and by virtue of the laws of the State of New York, and at

all said times the defendant was, and now is, a corporation known as a national banking association, created, organized and existing under the provisions of the act of Congress of the United States of America, relating to national banks.

That on the 3d day of December, 1890, one Emanuel Levi was the owner of one hundred shares of the capital stock of The Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 60; that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him, for that amount, and numbered B 61; that on the same date said Emanuel Levi was also the owner of fifty shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 62; that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 58; that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, the defendant above named, of the par value of one hundred dollars each, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B 59; that all of said stock and each and every of said certificates on said date, stood in the name of said Emanuel Levi on the books of the defendant.

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That on the 3rd day of December, 1890, Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein and whereby he promised to pay to the order of the plaintiff on demand, twenty-five thousand dollars at its office in Buffalo, with interest at six per cent. per annum, and delivered the same to the plaintiff, for value.

That on the 13th day of August, 1891, said Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein and whereby he promised to pay to the order of the plaintiff on demand, twenty thousand dollars, at its office in Buffalo, with interest at six per cent. per annum, and delivered the same to the plaintiff for value.

4

That on the 25th day of May, 1892, Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein and whereby he promised to pay to the order of the plaintiff on demand, ten thousand dollars, at its office in Buffalo, with interest at six per cent. per annum, and delivered the same to the plaintiff for value.

That as collateral security for the payment of said first mentioned note, he pledged and delivered to the plaintiff certificate B 60 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 61 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each, and certificate B 62 for fifty shares of the capital stock of the defendant of the par value of one hundred dollars each, and thereby empowered and authorized said insurance company, in case of default in the payment of the said note at its maturity to sell the said stock at public or private sale, as it might deem best.

That as collateral security for the payment of the said second above mentioned note, he pledged and delivered to the plaintiff, certificate B 58 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each, and certificate B 59 for one hundred shares of the capital stock of the defendant
5 of the par value of one hundred dollars each, and thereby empowered and authorized said plaintiff, in case of default in the payment of said note at its maturity, to sell the said stock at public or private sale, as it might deem best.

That as collateral security for the payment of the third above mentioned note, said Emanuel Levi pledged and delivered to said plaintiff, certificate B 58 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 59 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 60 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each; certificate B 61 for one hundred shares of the capital stock of the defendant, of the par value of one hundred dollars each, and certificate B 62 for fifty shares of the capital stock of the defendant, of the par value of one hundred dollars each, and thereby empowered and authorized said plaintiff, in case of default in the payment of the said note at its maturity, to sell the said stock at public or private sale, as it might deem best.

That heretofore, and before the 22nd day of June, 1896, each of said notes by their terms became due and payable, and payment thereof was demanded and refused, and by virtue of the power of sale contained in the certificates pledging said stock as collateral to the plaintiff as aforesaid, the plaintiff gave notice on the 22d day of June, 1896, that under and by virtue of said pledge of stock, default
6 having been made in the payment of said notes, it would sell the said certificates of stock, and each thereof at public auction, in the city of Buffalo, on the 30th day of June, 1896, at ten o'clock in the forenoon.

That pursuant to such notice at the time last mentioned, and at the place mentioned in said notice, the said certificates of stock, and each thereof, were duly offered for sale at public auction, to the highest bidder, and the said certificates were at said sale duly sold to the plaintiff, its bid therefor being the highest sum bidden on

said sale, and the plaintiff thereupon became, and was, and now is the owner of said certificates of stock.

That thereafter, and on or about the 1st day of July, 1896, the plaintiff presented the said certificates of stock, and each thereof, to the president and cashier of said defendant bank, at the office of said defendant, during banking hours, and demanded that the said certificates of stock, and each thereof, should be transferred on the books of said association to the plaintiff; that the said cashier and president of said bank both declined and refused to transfer the said certificates of stock, or either or any of them to the plaintiff as requested.

And this plaintiff further alleges upon information and belief, that since it purchased said stock, and after the demand upon defendant, that it should transfer the same to this plaintiff, the defendant has declared a dividend on the said stock, amounting to the sum of thirteen hundred and fifty dollars, but has refused to deliver said dividend to this plaintiff.

Wherefore, the plaintiff demands judgment herein, directing
7 the defendant to transfer the said certificates of stock, and each and every of them, upon the books of said defendant, to this plaintiff, and for judgment against the defendant for the dividends so declared which it has neglected and refused to pay to the plaintiff as requested, and for such other and further relief in the premises as to the court may seem proper, besides the costs of this action.

HICKMAN & PALMER,
Attorneys for Plaintiff, 3 *German Ins. Co.'s Bldg., Buffalo, N. Y.*

STATE OF NEW YORK, }
County of Erie, } ss:

Oliver J. Eggert being duly sworn deposes and says that he is an officer, viz: secretary of the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

OLIVER J. EGGERT.

Subscribed and sworn to before me this 16th day of October, 1896.

EDWARD D. STREBEL,
Notary Public, Erie Co., N. Y.

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Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

The defendant herein, by Lewis & Lewis, its attorneys, answering the plaintiff's complaint,

Upon information and belief, denies that on the 3rd day of December, 1890, one Emanuel Levi, was the owner of one hundred shares of the capital stock of the Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association to him for that amount and numbered B, 60.

And on information and belief, denies that on the same date said Emanuel Levi was also the owner of one hundred shares of the capital stock of the said Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association for that amount, and numbered B 61.

And upon information and belief, denies that on the same date, said Emanuel Levi was also the owner of fifty shares of the capital stock of said Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B, 63.

And upon information and belief, denies that on the same date said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, evidenced
9 by the certificate of stock issued by said association to him for that amount, and numbered B, 58.

And upon information and belief, denies that on the same date, said Emanuel Levi was also the owner of one hundred shares of the capital stock of said Third National Bank of Buffalo, evidenced by the certificate of stock issued by said association to him for that amount, and numbered B, 59.

And the defendant herein alleges that it has no knowledge or information sufficient to form a belief as to whether or not on the 3rd day of December, 1890, Emanuel Levi made his certain promissory note in writing, dated on that day, wherein or whereby he promised to pay to the order of plaintiff on demand, $25,000 at its office in Buffalo, with interest at 6 % per annum, or delivered the same to plaintiff for value, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not on the 13th day of August, 1891, said Emanuel Levi made his certain promissory note in writing, bearing date on that day, wherein or whereby he promised to pay to the order of the plaintiff on demand, $20,000 at its office in Buffalo, with interest at 6 % per annum, or delivered the same to plaintiff for value, and therefore denies the same.

And this defendant further alleges that it has no knowledge or information sufficient to form a belief as to whether or not on the

25th day of May, 1892, Emanuel Levi made his certain
10 promissory note in writing, bearing date on that day, wherein or whereby he promised to pay to the order of the plaintiff on demand $10,000 at its office in Buffalo, with interest at 6 % per annum, or delivered the same to the plaintiff for value, and therefore denies the same.

And this defendant further alleges that it has no knowledge or information sufficient to form a belief as to whether or not, as collateral security for the payment of said first mentioned note the said Emanuel Levi pledged or delivered to the plaintiff certificate B 60, for one hundred shares of the capital stock of the defendant, or certificate B 61, for one hundred shares of the capital stock of the defendant, or certificate B 62 for fifty shares of the capital stock of the defendant, or thereby empowered or authorized said insurance company in case of default in the payment of said note at its maturity, to sell the said stock at public or private sale as it might deem best, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not as collateral security for the payment of said second above mentioned note, said Levi pledged or delivered to the plaintiff certificate B 58, for one hundred shares of the capital stock of the defendant, or certificate B 59 for one hundred shares of the capital stock of defendant, or thereby empowered or authorized said plaintiff in the case of default in the payment of said note, at its maturity, to sell said
11 stock at public or private sale, as it might deem best, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether for collateral security for the payment of the third above mentioned note, said Emanuel Levi pledged or delivered to said plaintiff, certificate B 58, for one hundred shares of the capital stock of the defendant, or certificate B 59, for one hundred shares of the capital stock of the defendant, or certificate B 60, for one hundred shares of the capital stock of the defendant, or certificate B 61, for one hundred shares of the capital stock of defendant, or certificate B 62, for fifty shares of the capital stock of the defendant, or thereby empowered or authorized said plaintiff, in case of default in the payment of said note at its maturity, to sell the said stock at public or private sale, as it might deem best, and therefore denies the same.

And this defendant alleges that it has no knowledge or information sufficient to form a belief as to whether or not heretofore and before the 22nd day of June, 1896, each of said notes by their terms became due and payable, or payment thereof was demanded and refused, or by virtue of the power of sale contained in the certificates pledging said stock as collateral to the plaintiff, as set out in the said complaint, the plaintiff gave notice on the 22nd day of June, 1896, that under or by virtue of said pledge of stock, default having been made in the payment of said notes, it would sell the said certificates

of stock or each thereof at public auction on the 30th day of
12 June, 1896, at ten o'clock in the forenoon, and therefore denies the same.

And this defendant upon information and belief denies that pursuant to such notice at the time last mentioned, or at the place mentioned in said notice, the said certificates of stock or each thereof were duly offered for sale at public auction to the highest bidder, or that the certificates were at said sale duly sold to the plaintiff, its bid therefor being the highest sum bidden on said sale, or that the plaintiff thereupon became or was, or now is the owner of said certificates of stock.

II.

And for a second separate and further defense to the plaintiff's pretended cause of action herein, and as a counter-claim thereto, the defendant alleges, that at the time that it is claimed that the said Emanuel Levi made his certain promissory note in writing, to-wit the 3rd day of December, 1890, wherein and whereby he promised to pay to the order of the plaintiff herein the sum of $25,000, the said Emanuel Levi was indebted to the Third National Bank of Buffalo in the sum of $28,000, as a collateral and continuing security to which, and for any renewal or renewals or part renewal or part renewals, for future advances made by said bank to said Emanuel Levi, the said bank held all the stock of the said The Third National Bank of Buffalo as collateral security to said indebtedness under a pledge made by the said Emanuel Levi to it, the said bank.
13 And at the time that it is claimed that the said Emanuel Levi made his certain promissory note in writing, to-wit the 13th day of August, 1891, wherein and whereby he promised to pay to the order of the plaintiff herein the sum of $20,000, the said Emanuel Levi was indebted to the Third National Bank of Buffalo in the sum of $32,000; and at the time that it is claimed that the said Emanuel Levi made a certain promissory note in writing to-wit, the 25th day of May, 1892, wherein and whereby he promised to pay to the order of the plaintiff herein the sum of $10,000, the said Emanuel Levi was indebted to the Third National Bank of Buffalo in the sum of $20,000, as a collateral and continuing security, to which, and for any renewal or renewals or part renewal or part renewals, or future advances made by the said bank to the said Emanuel Levi, the said bank held all the stock of the said Third National Bank of Buffalo as collateral security to said indebtedness under a pledge made by the said Emanuel Levi, to it, the said bank.

And this defendant alleges that there is still due to it from the said estate of Emanuel Levi, deceased, as direct renewal of the indebtedness, above set forth, of Emanual Levi to the defendant, the sum of $16,357.99, and interest thereon from the 27th day of August, 1896.

And this defendant further alleges that all of the said stock mentioned in the plaintiff's complaint herein, as being issued to said

Emanuel Levi, bore the following endorsement printed across the face thereof, as follows:

14 "Subject to the lien or liens referred to in section 15 of the by-laws of said bank in the following words: No transfer of the stock of this association shall be made without the consent of the board of directors by any stock holder who shall be liable to the association either as principal debtor, or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends."

And this defendant further alleges upon information and belief that the plaintiff herein did have actual knowledge of the facts aforesaid, and knew that the said Emanuel Levi was indebted to the said defendant herein in a large amount, and that it held said stock as collateral security to said indebtedness as above set forth.

And upon information and belief the defendant alleges that it extended the time for the payment of said indebtedness, and furnished other considerations to the said Emanuel Levi, upon the personal security of such stock, in good faith, as a consideration for the pledge of such stock to it by said Levi; that it took such pledge in good faith to secure the payment of a debt previously contracted in good faith; that the plaintiff was informed of such facts, and plaintiff's claim or lien if any is inferior to and subsequent to the claim or lien of this defendant.

III.

And for another, separate and third defence to the plaintiff's pretended cause of action herein, the defendant alleges upon information and belief, that heretofore and before the commencement of this action the said Emanuel Levi departed this life, and left

15 a last will and testament wherein and whereby he nominated Rosa Levi and Louis E. Levi as the executors of his said last will and testament and that thereafter and before the commencement of this action, the said will of said Emanuel Levi was duly offered for probate and probated by the surrogate of the county of Erie, and the said Rosa Levi and Louis E. Levi, prior to the beginning of this action, qualified as such executors and entered upon the duties and are now acting as such executors of the last will and testament of Emanuel Levi, deceased.

And the defendant alleges upon information and belief, that there is a defect in the party defendant herein, inasmuch as the said executors of the estate of Emanuel Levi, are necessary and material parties to this action, and that no proper adjudication can be had hereon unless such executors are made parties defendant hereto.

Wherefore, defendant prays the judgment of this court dismissing plaintiff's complaint herein, and establishing the amount due to this defendant from the estate of the said Emanuel Levi, deceased, and declaring the lien, if any, of the plaintiff herein, as subsequent to the lien of the defendant in and to the stock mentioned in the complaint in this action, and that the plaintiff and all other persons be barred and foreclosed of all right, claim, lien and equity of redemp-

tion in and to said stock, and that the said stock, or so much thereof as may be sufficient to raise the amount due the defendant for principal, interest and costs, may be decreed to be sold according to law, and that out of all the moneys arising from the sale thereof,
16 that the defendant may be paid the amount due by virtue of the said indebtedness of the estate of Emanuel Levi to it, with interest to the time of such payment, and the costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same; and that the said Louis E. Levi and Rosa Levi, as executors of the last will and testament of Emanuel Levi, deceased, may be adjudged to pay any deficiency which may remain after applying all said moneys so applicable thereto, and that the defendant may have such other or further relief, or both, in the premises as to the court may seem proper.

LEWIS & LEWIS,
Defendant's Attorneys, 14 *Court Street, Buffalo, N. Y.*

COUNTY OF ERIE, } ss:
City of Buffalo, }

Charles A. Sweet, being duly sworn, deposes and says: That he is the president of the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES A. SWEET.

Sworn to before me this 14th day of Dec., 1896.

H. LE LANZLIN,
Notary Public in and for Erie County, N. Y.

17 Supreme Court, Erie County.

BUFFALO GERMAN INSURANCE COMPANY } Erie Special Term for
against } the Trial of Issues of
THIRD NATIONAL BANK OF BUFFALO. } Fact.

Hickman & Palmer, for plaintiff.
George L. Lewis and Adelbert Moot, for defendant.

The above entitled action having been brought to trial at a special term of the supreme court for the trial of issues of fact, held at the city of Buffalo, on the 25th day of April, 1900, after hearing the proofs and the allegations — the respective parties, I make the following

Finding of Facts.

I. That the plaintiff is a monied corporation organized under the laws of the State of New York; that the defendant is a national banking corporation organized under the act of Congress authoriz-

ing the formation of national banks passed in 1864 and incorporated thereunder in 1865.

II. That Emanuel Levi was the owner of four hundred and fifty shares of the capital stock of the defendant of the par value of forty-five thousand dollars, evidenced by certain certificates of stock issued to him by the defendant and numbered B 58, B 59, B 60, B 61, and B 62, the first four of said certificates being for one hundred shares each and the fifth certificate being for fifty shares.

18 That said certificates of stock bear date July 2nd, 1888, and are in form as follows:

"Number B–60. Shares 100.

STATE OF NEW YORK,

Third National Bank of Buffalo.

This is to certify that Emanuel Levi is the owner of one hundred shares, of one hundred dollars each, of the capital stock of the Third National Bank of Buffalo, subject to the lien or liens referred to in section fifteen of the by-laws of said bank in the following words:

'No transfer of the stock of this association shall be made without the consent of the board of directors, by any stockholder, who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.'

And that the said stock is transferable only on the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with said by-laws.

Dated, Buffalo, N. Y., this 2d day of July, 1888.

CHARLES A. SWEET, *President.*

N. ROCHESTER, *Cashier.*"

III. That on December 3, 1890, said Emanuel Levi borrowed of the plaintiff the sum of twenty-five thousand dollars, giving to it therefor his demand note, with interest, and secured the payment

19 thereof by delivering said certificates B 60, B 61 and B 62 and an assignment thereof, together with a receipt for the amount of said loan, and in and by which he also assigned said certificates to the plaintiff as collateral security for the payment of said loan, and in case of default in the payment of said loan and interest authorized the said plaintiff to sell the said stock and certificates at public or private sale on five days' notice by letter mailed to him at his address, and from the proceeds of such sale, after deducting all costs and expenses, to pay the said debt and interest; the balance to be returned to said Levi.

IV. On August 13, 1891, the said Emanuel Levi borrowed from the plaintiff the sum of twenty thousand dollars, giving his demand note, with interest, and secured the payment thereof by delivering said certificates B 58 and B 59 to the plaintiff together with an

assignment and receipt similar in form to those mentioned in the third finding hereof.

V. That on May 25, 1892, the said Emanuel Levi borrowed the sum of ten thousand dollars from the plaintiff, giving his demand note, with interest, and secured the payment thereof by delivering to the plaintiff all of the certificates hereinbefore mentioned together with an assignment and receipt similar in form to those mentioned in the third finding hereof.

VI. That after borrowing said sums from the plaintiff and the giving to it of said assignments, and on June 10, 1893, Emanuel Levi died, and that thereafter and on June 21st, 1893, Rosa
20 Levi and Louis E. Levi were duly appointed as the executors of his estate and qualified as such, and are still acting as such.

VII. That on the 9th day of June, 1896, there was due and unpaid on said loans the sum of fifty-five thousand dollars of principal, three hundred dollars of the interest due on January 1, 1896, and interest from January 1, 1896.

VIII. That on June 9, 1896, the plaintiff caused to be served upon each of the executors of the estate of Emanuel Levi a notice in writing of the default in the payment of said debt and demanding the payment thereof and interest, and requiring the payment of said debt and the redemption of said stock on or before the 16th day of June, 1896, and stating that in the event of failure to comply with such demand that the loan would be collected by the sale of the stock in accordance with the conditions of the loans.

IX. That such debts were not paid nor said stock redeemed as required, and on the twenty-second day of June, 1896, the plaintiff caused a notice to be served upon each of the executors of the estate of said Levi, stating the conditions of said loans and the pledging of said certificates of stock, the default in the payment and redemption thereof, and giving notice that said certificates of stock and each thereof would be sold at public auction at the office of the board of directors, No. 4 German Insurance Company's building, corner Main and Lafayette streets, Buffalo, N. Y., on the 30th day of June, 1896, at ten o'clock in the forenoon; and that
21 on the same day the plaintiff caused a copy of such notice to be posted at each of the following public places in the city of Buffalo: One copy on the bulletin board at the easterly entrance to the city and county hall; one copy on the bulletin board at the entrance to the Real Estate exchange on Pearl street; one copy on the bulletin board at the entrance to the municipal building on Delaware avenue.

X. That pursuant to such notice the plaintiff caused the said certificates and each thereof to be offered for sale at public auction at the time and place in said notice mentioned, there being present at such time and place the representatives of the plaintiff, Loran L. Lewis, Jr., attorney for the defendant, Adelbert Moot, attorney for the Levi executors and Louis E. Levi, one of the executors in person. That said sale was duly conducted and said certificates sold to the

plaintiff for the sum of forty-four thousand dollars, that being the highest sum bidden therefor.

XI. That after said sale and on the same day, the secretary and attorney for the plaintiff took said certificates of stock to the defendant, and demanded of the president and cashier of the defendant that said stock be transferred on the books of the defendant from Levi to the plaintiff, at the same time presenting to such officers the certificates of stock and evidence of the regularity of said sale thereof, and that the defendant and its officers refuse to make such transfer.

XII. That at the time of the sale of the stock in question to and its purchase by the plaintiff, the estate of Emanuel Levi was
22 largely indebted to the defendant, and the defendant claims that it then had and now has a right to a lien upon said certificates of stock as security for the payment thereof; that Levi's indebtedness to the defendant accrued prior to the pledging of any of said certificates to the plaintiff; that no tender or offer to pay said indebtedness by the plaintiff or by any other person or party has ever been made. That the plaintiff was notified of defendant's claim immediately before the sale of June 30th, 1896, and the defendant forbade such sale except subject to defendant's claims, demands and liens.

XIII. That the defendant was organized by articles of association bearing date the 9th day of February, 1865, which were duly approved by the Comptroller of the Currency at Washington, which articles of association contain, among other things the following clause: "That the board of directors shall have power to make all "by-laws that may be proper and convenient for them to make "under said act for the general regulation of the business of the "association and the management and administration of its affairs, "which by-laws may prohibit, if the directors shall so determine, "the transfer of stock owned by any stockholder who may be liable "to this association either as principal debtor or otherwise, without "the consent of the board."

XIV. That on the 18th day of February, 1865, the board of directors of said defendant duly adopted by-laws, among which is the following clause:

"Transfers of stock.—SEC. 15. The stock of this bank, shall
23 "be assignable only on the books of this bank subject to "the restrictions and provisions of the act, and a transfer "book shall be kept in which all assignments and transfers of stock "shall be made. No transfer of the stock of this association shall "be made without the consent of the board of directors by any stock-"holder who shall be liable to the association either as principal "debtor or otherwise, which liability shall be a lien upon the said "stock and all profits thereof, and dividends and certificates of stock "shall contain upon them notice of this provision."

XV. That on the 1st day of October, 1890, the said Emanuel Levi was indebted to the defendant in the sum of thirty-one thousand dollars, which had existed, in whole or in part, since May 1st, 1890,

and as security for the payment thereof, the said defendant held promissory notes of the said Emanuel Levi. That upon the 1st day of October, 1890, the said Emanuel Levi applied for a further loan of twelve thousand dollars, and proposed to secure the same by note made by himself and endorsed by his son, Louis Levi, and to treat and consider as delivered to the defendant the stock which he owned in the defendant corporation, and which was then in the safe deposit vaults of the Buffalo Loan & Trust Company as security for the payment of the said indebtedness of thirty-one thousand dollars, and the loan that day made; and that thereupon, and in reliance upon such further and additional security for the payment of the indebtedness and the endorsement of the paper of the said Emanuel Levi of
24 twelve thousand dollars by his son, Louis Levi, the said defendant made the said loan of twelve thousand dollars and extended the time of payment of the thirty-one thousand dollars old indebtedness.

XVI. The loans which the bank had made were *were* evidenced after the death of Levi by notes in all respects, save as to amount, as follows:

"$16,357.99. BUFFALO, N. Y., *Aug. 17th*, 1896.

On demand after date we promise to pay to the order of Louis E. Levi sixteen thousand, three hundred and fifty-seven and 99 one hundredths dollars, at the Third National Bank of Buffalo, N. Y.

Value received with int.

LOUIS E. LEVI, *Ex.*
ROSA LEVI, *Ex.*"

Endorsed: "Louis E. Levi, Rosa Levi."

At the time of the purchase of the stock by the plaintiff the only claim that the bank had was for a loan evidenced by a note, which the note above set forth was given to renew in part, and which was in the above form; also, the alleged claim of the bank upon the bank stock of said Levi as security for such loan; also, the stock of Levi in the German bank and German Insurance Company, which had been assigned to it as collateral security.

XVII. That said defendant held as security for the said indebtedness of the said Levi's stock in the German bank and in the Buffalo German Insurance Company upon which and in full thereof there was realized by said bank on the 13th day of February, 1900,
25 the sum of nine thousand dollars and on the 14th day of February, 1900, the sum of eight hundred and thirty-seven dollars.

That the said defendant bank received from dividends upon the said stock of the German bank and upon the stock of the Buffalo German Insurance Company, certain amounts at different times down to the 14th day of February, 1900.

That after the application of the said sums realized from the sale of the said German Bank stock and said German Insurance Com-

pany's stock, and from dividends received thereon, there was due said Third national bank upon said Levi's indebtedness, the sum of nine thousand, eight hundred, eighty-six and $\frac{33}{100}$ dollars as of February 14, 1900, for which sum said bank claims a lien on said stock, and which sum it claims to have extinguished by the application of dividends declared on said Levi stock in said Third national bank.

XVIII. That the Third National Bank of Buffalo has declared dividends upon the stock of said Levi since the first day of July, 1896, as follows: $1350.00 on July 10th, 1896; $1350.00 on January 2nd, 1897; $1350.00 on July 1st, 1897; $1350.00 on January 3rd, 1898; $1350.00 on July 1st, 1898; $1350.00 on January 3rd, 1899; $1350.00 on July 1st, 1899, and $1350.00 on January 1st, 1900. That none of said dividends have been paid to the plaintiff. That ever since the issue of said stock to Levi the defendant has paid all dividends, interest and profit thereon to said Levi, or his estate, until July 1st, 1896. That said plaintiff did not at any time until
26 June 30, 1896, demand of said defendant a transfer of said stock, or any part thereof, or the payment to it of any dividend thereon.

XIX. That said dividends on said stock declared by the defendant since July 1st, 1896, with interest thereon from the date on which they were declared to the day of trial, amount in the aggregate to the sum of $12,135.83.

As conclusions of law, from the foregoing facts, I find and decide:

First. That by and through the pledge of said stock of the plaintiff, and the sale thereof, on the 30th day of June, 1896, the plaintiff became, and was the owner of said certificates of stock, and each and all thereof, and was entitled to a transfer thereof on the books of the defendant.

Second. That the dividends declared on said stock by defendant on and since July, 1896, belong to and are the property of the plaintiff, and amount with interest to the sum of $12,135.83.

Third. That the plaintiff is entitled to judgment directing the defendant to transfer the said certificates of stock, and each and every of them upon the books of said defendant, to the plaintiff, and for judgment in favor of the plaintiff against the defendant, for the sum of $12,135.83, together with the costs of this action to be taxed.

Let judgment be entered herein accordingly.

Dated, Buffalo, N. Y.

JOHN S. LAMBERT,
Justice Supreme Court.

27 Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THIRD NATIONAL BANK OF BUFFALO.

The issues in this action having been brought on for trial before the Honorable John S. Lambert, at an equity term of this court, held in and for the county of Erie, on the 25th day of April, 1900,

and the proofs and allegations of the respective parties having been heard, and after due deliberation thereon, the court having filed its decision dated October 12th, 1900, directing this judgment, and the costs of this action having been taxed at the sum of $1391.44, now upon motion of Hickman and Palmer, attorneys for the plaintiff, it is

Ordered and adjudged, that by and through the pledge of Emanuel Levi to the plaintiff, of the capital stock of the defendant, evidenced by the certificates of the stock of the defendant, numbered B 58 for one hundred shares, B 59 for one hundred shares, B 60 for one hundred shares, B 61 for one hundred shares and B 62 for fifty shares, said shares being of the par value of one hundred dollars each, and which said certificates are described in the complaint and decision herein and the sale thereof by the plaintiff on the 30th day of June, 1896, the plaintiff became, and was the owner of each
28 and all of said certificates of stock, and was and is entitled to a transfer thereof on the books of the defendant, upon said certificates being tendered for surrender and cancellation.

And it is further ordered and adjudged, that the dividends declared by the defendant in July, 1896, and since then, down to the trial of this action, amounting to the sum of $12,135.83, belong to, and are the property of the plaintiff.

It is further ordered and adjudged, that upon the tender of said certificates or any of them, by the plaintiff or its agents or assigns, to the defendant, the defendant shall, upon request so to do, transfer the said certificates of stock, and each and every of them, on the books of the defendant, to the plaintiff or its agents or assigns as it may direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns.

And it is further ordered and adjudged, that the plaintiff, The Buffalo German Insurance Company, recover of the defendant, Third National Bank of Buffalo, the sum of $12,135.83, being the amount of dividends on said stock to the date of this trial, together with the sum of $1391.44 costs and disbursements in this action, amounting in the whole to the sum of $13,527.27, and that it have execution therefor.

Judgment signed this 16th day of October, 1900.

FRANK P. MARQUIS, *Dep. Clerk.*

29 Supreme Court, Erie County.

BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

The defendant in the above entitled action hereby excepts to the conclusions of law in the above entitled action as made by his honor, John S. Lambert, justice, supreme court, dated Buffalo, N. Y., as follows:

First. Said defendant excepts to the first conclusion of law and to each and every part thereof.

Second. Said defendant excepts to the second conclusion of law and to each and every part thereof.

Third. Said defendant excepts to the third conclusion of law and to each and every part thereof.

LEWIS & LEWIS,
Attorneys for Defendant, 23–25 Erie Co. Sav. Bank Building, Buffalo, N. Y.

To Hickman & Palmer, attorneys for plaintiff, and to Otto H. Wende, clerk of county of Erie.

30 Supreme Court, Erie County.

BUFFALO GERMAN INSURANCE COMPANY
against
THIRD NATIONAL BANK OF BUFFALO.

Please take notice that the Third National Bank of Buffalo appeals to the appellate division of the supreme court, fourth department from the judgment in this action signed the 16th day of October, 1900, and entered in Erie county clerk's office on that day, which orders and adjudges that by and through the pledge of Emanuel Levi to the plaintiff of the capital stock of the defendant evidenced by certificates of stock of the defendant, and which said certificates are stated in said judgment as being described in the complaint and the decision herein, and the sale thereof by the plaintiff on the 30th day of June, 1896, the plaintiff became the owner of each and all of said certificates of stock and was and is entitled to a transfer thereof on the books of said defendant upon said certificates being tendered, for surrender and cancellation, and which further orders and adjudges that the dividends declared by the defendant on July, 1896, and since then down to the trial of this action, amounting to the sum of $12,135.83, belong to and are the property of the plaintiff, and which further orders and adjudges that upon the tender of said certificates, or any of them, by the plaintiff, or its agents or assigns, to the defendant, the defendant shall, upon request so to do, transfer said certificates of
31 stock and each and every of them on the books of the defendant to the plaintiff, or its agents or assigns, as it may direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns, and which further orders and adjudges that the plaintiff, Buffalo German Insurance Company, recover of the defendant, The Third National Bank of Buffalo, the sum of $12,135.83, being the amount of dividends on such stock to the date of this trial, together with the sum of $1391.44, costs and disbursements in this action, amounting in all to the sum of $13,527.27, and that it have execution therefor.

And you will please take notice that the said defendant appeals

from the whole of said judgment and from each and every part thereof.

Dated, Buffalo, N. Y., October 29, 1900.

LEWIS & LEWIS,
Attorneys for Defendant, 23–25 *Erie Co. Sav. Bank Bldg., Buffalo, N. Y.*

To Hickman & Palmer, attorneys for plaintiff, and
To Otto H. Wende, county clerk, Erie county.

32 STATE OF NEW YORK, *Erie County Clerk's Office*, } ss.:

I, Otto H. Wende, clerk of said county, do hereby certify that I have compared the annexed copy of judgment roll, exceptions to decision and notice of appeal and copy indorsements thereon, with an original thereof, entered and on file in this office, and find the same to be true transcripts of and from the said originals, and the whole of each thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Buffalo, this 15th day of December, A. D. 1900.

[SEAL.] OTTO H. WENDE, *Clerk.*

(Stamp.)

33 At a term of the appellate division of the supreme court, held in and for the fourth judicial department, at the city of Rochester, on the 4th day of April, 1901.

Present: Hon. William H. Adams, presiding justice. Hon. Peter B. McLennan, Hon. Alfred Spring, Hon. Pardon C. Williams, Hon. Frank C. Laughlin, associate justices.

THE BUFFALO GERMAN INSURANCE CO., Respondent, *vs.* THE THIRD NATIONAL BANK OF BUFFALO, Appellant. } Order of Affirmance on Appeal from Judgment.

The above named, The Third National Bank of Buffalo, the appellant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Erie, on the 16th day of October, 1900, and the said appeal having been argued by Mr. George L. Lewis, of counsel for the appellant and by Mr. Arthur W. Hickman, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment so appealed from be and the same is hereby affirmed; and the respondent recover of the appellant the costs of this appeal.

All concur.

[L. S.] NEWELL C. FULTON, *Clerk.*

34 Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THIRD NATIONAL BANK OF BUFFALO.

The defendant in the above entitled action having appealed to the supreme court, appellate division, fourth department, from the whole and each and every part of the judgment rendered in said action upon the trial thereof before Hon. John S. Lambert, at a special term for the trial of issues of fact, held in and for the county of Erie, on the 25th day of April, 1900, and which judgment was entered in the office of the clerk of the county of Erie, on the 16th day of October, 1900, and the said appeal having been noticed for argument before the said appellate division at the term thereof beginning on the 12th day of March, 1901, and having been argued before the justices of the appellate division of the supreme court for the fourth department, at the city of Rochester, New York, on the 2nd day of April, 1901, duly made an order affirming the judgment so appealed from, with costs to the plaintiff and respondent, and the costs of the plaintiff having been adjusted at the sum of one hundred, thirteen and seventy-five one-hundredths dollars, now on motion of Hickman & Palmer, attorneys for the plaintiff, it is

Ordered and adjudged, that the judgment of the supreme court in the above entitled action, entered in the office of the clerk of
35 the county of Erie, on the 16th day of October, 1900, be, and the same hereby is in all things and respects affirmed, and that the plaintiff, The Buffalo German Insurance Company, recover of the defendant, Third National Bank of Buffalo, the sum of one hundred, thirteen and seventy-five one-hundredths dollars costs on said appeal, and that the plaintiff have execution therefor.

Judgment signed this 10th day of April, 1901.

FRANK P. MARQUIS,
D. P. Clerk.

Take notice that an order and judgment duly granted in the within entitled action, with true copies of which you are herewith served, were this day entered in the office of the clerk of the county of Erie at Buffalo, N. Y.

Dated, April 10, 1901.

HICKMAN & PALMER,
Plaintiff's Attorneys.

To Lewis & Lewis, Esqs., defendant's attorneys.

36 Supreme Court, Erie County.

THE BUFFALO GERMAN INSURANCE CO., Respondent,
vs.
THE THIRD NATIONAL BANK OF BUFFALO, Appellant.

You will please take notice that The Third National Bank of Buffalo, the above named appellant, appeals to the court of appeals of the State of New York from an order of the appellate division, of the supreme court, fourth department, herein entered in the office of the clerk of the county of Erie, on the 10th day of April, 1901, affirming, with $93.75 costs, the judgment in this action entered in the clerk's office of the county of Erie, on the 16th day of October, 1900, in which it was adjudged that the plaintiff, Buffalo German Insurance Company, recover of the defendant, Third National Bank of Buffalo, the sum of $12,135.83, together with $1391.44 costs and disbursements in said action, and the said appellant appeals from the whole of said order and from each and every part thereof.

You will also please take notice that the appellant appeals to the court of appeals of the State of New York from a judgment entered upon said order in the office of the clerk of the county of Erie, on the 10th day of April, 1901, affirming, with $93.75 costs, the judgment in this action entered in the office of the clerk of the county of Erie on the 16th day of October, 1900, in which it was ad-
37 judged that the plaintiff, Buffalo German Insurance Company, recover of the defendant, The Third National Bank of Buffalo, the sum of $12,135.83, together with $1391.44 costs and disbursements in said action, and the said appellant appeals from the whole of said judgment and from each and every part thereof.

Dated Buffalo, N. Y., October 4, 1901.

Yours, etc.,

LEWIS & LEWIS,
Attorneys for Appellant,
23–25 *Erie Co. Savings Bank Bldg., Buffalo, N. Y.*

To Messrs. Hickman & Palmer, attorneys for respondent, and to the clerk of the county of Erie.

It is hereby stipulated by and between the parties hereto, by their attorneys, that the foregoing papers, remittitur from the appellate division, fourth department, order of the appellate division upon affirmance, the judgment of the supreme court upon the order of affirmance, and the notice of appeal to the court of appeals, are true and correct transcripts and copies of and from the original and of the whole thereof, and which said papers are entered and on file in Erie county clerk's office, and that the foregoing printed papers constitute the proper papers on appeal, and the whole thereof, and that they may be used upon the argument of this appeal in the court of appeals, with the same force and effect as though the same were cer-

tified to by the clerk, and that the certification thereof is, pursuant to section 3301 of the Code of Civil Procedure, hereby waived.

Dated November 30, 1901.

HICKMAN & PALMER,
Attorneys for Respondent.
LEWIS & LEWIS,
Attorneys for Appellant.

38 Thereupon, the court rendered the following judgment:

Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 10th day of June, in the year of our Lord one thousand nine hundred and two, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.
W. H. SHANKLAND, *Clerk.*

Remittitur, June 11th, 1902.

THE BUFFALO GERMAN INSURANCE COMPANY, Respondent,
against
THE THIRD NATIONAL BANK OF BUFFALO, Appellant.

Be it remembered, that on the 2nd day of December, in the year of our Lord one thousand nine hundred and one, The Third National Bank of Buffalo, the appellant in this action, came here into the court of appeals, by Lewis and Lewis, its attorneys, and filed in the said court a notice of appeal and return thereto from the order and judgment of the appellate division of the supreme court in and for the fourth judicial department. And The Buffalo German Insurance Company, the respondent in said action afterwards appeared in said court of appeals by Hickman and Palmer, its attorneys.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals having heard this cause argued by Mr. George L. Lewis, of counsel for the appellant, and by Mr. Arthur W. Hickman, of counsel for the respondent, and
39 after due deliberation had thereon, did order and adjudge that the judgment of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be, and the same hereby is, affirmed, with costs, as aforesaid.

And hereupon, as well as the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *June 11th*, 1902.

I, hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

40 Whereupon, the court of appeals affirmed with costs the judgment herein appealed from, upon the opinion of the court delivered on the decision of a former appeal reported in 162 N. Y. 163, in words and figures as follows, to wit:—

41 In the Court of Appeals of the State of New York.

BUFFALO GERMAN INSURANCE COMPANY, Respondent,
against
THIRD NATIONAL BANK OF BUFFALO, N. Y., Appellant.

Opinion reported in 162 N. Y., p. 168.

GRAY, *J.*:

The decision of the question in this case turns upon provisions of the national banking act, passed by Congress in 1864, and the construction which they should receive, in the light of opinions of the Supreme Court of the United States. The original act for the incorporation of national banks, which was passed in 1863, contained, in section 36, the provision that the capital stock "shall be assignable on the books *the books* of the association in such manner as its by-laws shall prescribe, but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any debt which shall have become due and remain unpaid * * * and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association." In 1864, the act of 1863 was repealed by a new enactment as to national banking associations, whereby it was provided, in section 35, "that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such

shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," etc. (16 U. S. Stat. at Large, 110). The act of 1864 did not re-enact
42 any of the provisions which were contained in section 36 of the act of 1863 and the section, therefore, was expressly repealed. (*Bullard v. Bank*, 18 *Wall., at p.* 594.)

The defendant was organized under the act of 1864 and there was, not only, no authority in the act for the by-law referred to, and embodied in the language of the certificates of stock, but such a by-law would be inconsistent therewith. (*Bullard v. Bank, supra.*) The restrictions imposed by section 36 of the act of 1863 upon the shareholders had been removed and banking associations were prohibited from permitting any indebtedness on the part of their stockholders upon the security of the shares of their own capital stock. It would seem, therefore, that a by-law seeking to impose restrictions upon transfers of stock, by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank, would be quite inoperative to accomplish such a purpose and, equally so, any statement upon the certificate of stock based upon the existence of such a by-law. The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The appellate division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a Federal law, it should be governed in its determination by the decisions of the supreme Federal court and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the national banking act is not in the absence of any declaration to that effect, void, or incaple of enforcement. Under the authority of certain cases in the United States Supreme Court, which are considered in the opinion, it was pointed out that the validity of certain transactions by
43 national banks with their debtors was held to be a question only for the Government to raise and that the effect of their violation of the statute was not to invalidate the transaction itself, but to subject them to charter proceedings on the part of the Government. (*Bank v. Matthews*, 98 *U. S.* 621; *Bank v. Whitney*, 103 *ib.* 99; *Thompson v. Bank*, 146 *ib.* 240.) Hence, it was deemed to follow that, in the present case, the bank's claim to be entitled to an equitable lien, though against a purchaser for value and in good faith of its shares in the market, must be allowed and any offense against the banking act involved must be left to governmental cognizance. I believe this conclusion to be fallacious and that the reasoning of the learned justices below is without regard to the distinction which exists between those cases, in their facts and in the principle underlying their decision, and the earlier cases which construed the national banking acts and declared the doctrine that loans by banking associations to their stockholders do not give a lien to the bank upon their stock. (*Bank v. Lanier*, 11 *Wall.* 369;

Bullard v. Bank, supra.) I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for the defendant. If we assume the existence of a contract between the defendant bank and Levi, (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge in order to raise a privilege against third persons. (*Casey v. Cavaroc*, 96 *U. S.* 467; *Wilson v. Little*, 2 *N. Y.* 443.)

The defendant is asking the court to declare an equitable lien in its favor upon the shares of stock against a third person and, 44 in that respect, the case is unlike those cases where the Federal court has held that a national bank might enforce a security which it had taken and held, notwithstanding the claim of the borrower that the transaction was in violation of some express provision of the law. The defendant never had possession of the stock and being under the prohibition of the banking act as to a transaction of a loan upon the security of its own shares of stock, it is compelled to take the position that, having dealt with Levi upon the faith that his ownership of the stock would be an added security for the performance of his promise to pay his loans and the certificates of stock carrying notice to persons dealing with Levi with respect to them that any transfer thereof would be subject to a lien in favor of the bank for any liability of the stockholder, it should be allowed an equitable lien thereon, superior to any right of the plaintiff thereto.

I should say that there was a marked difference between any such claim of the bank, which slights a provision of the banking law, intended to negative the right to a lien and to confer the valuable character of transferability upon national bank shares, in the public interests, and a claim which a borrower, or his representative, asserts against the right of a national bank, as his creditor, to realize its debt upon securities which have been held by it in pledge, though not within the class of those it was authorized to hold. The demand of the bank is to have the court declare an equitable lien upon its outstanding stock, by virtue of a by-law and of notice thereof on the certificates, when the banking act prohibited loans by it upon the security of its own shares and thereby rendered any by-law in contravention of the act, or any notice based thereon, wholly inoperative.

In *Bank v. Lanier*, (*supra*,) the certificate of stock declared that the shares were transferable on the books of the bank *only on* 45 *surrender of the certificates:* This limitation was imposed by the by-laws; which, further, provided that the stock of the bank should be assignable, subject to the provisions and restrictions of the 36th section of the act of 1863. Lanier and Handy purchased the stock of Culver, to whom it had been issued, and, their

request for a transfer being refused, an action was brought against the bank to obtain pecuniary satisfaction. The bank defended upon the ground that it had a lien upon the stock for Culver's indebtedness to it, by virtue of the provisions of the 36th section of the act of 1863; which remained in operation, notwithstanding its repeal in 1864, by means of a by-law, adopted while the section was in force, declaring that the stock should be transferable subject to the provisions and restrictions of the act of Congress aforesaid. It appeared that the bank had sold and transferred the Culver shares upon its books to a third person and had applied the proceeds of the sale upon the indebtedness, before Culver assigned the certificates to Lanier and Handy. It was held that the provisions of the act of 1864 governed the conduct of banking associations, whether they were organized before or after it became a law, and that the prohibition upon the making of loans on the security of the shares of their own capital stock applied. The object of the new act was stated to be, to make national banks subserve public purposes and to place shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. It was a change in the policy of the Government and as the restrictions of the act of 1863 fell, "so did that part of the bank's by-law relating to the subject fall with them." The judgment against the bank was affirmed.

In *Bullard v. The Bank*, (*supra*), the defendant was organized under the national banking act of 1864, and issued to one Clapp certain shares of its capital stock. He borrowed moneys from
46 the bank on his notes and subsequently was adjudged a bankrupt. The plaintiff as his trustee in bankruptcy, demanded a transfer of the stock to him as part of the bankrupt's assets; but the bank refused, claiming a lien upon it by force of its by-law, to the extent of the notes held by it. The action was then brought against the bank for refusing to allow the transfer asked for and the questions certified for determination were, whether a national bank could acquire a valid lien upon the shares of its stockholders by its articles, or by-laws and whether the bank was entitled to hold the interest of Clapp in the stock by way of lien, or security, for all, or any of the notes. It was held, on the authority of the *Lanier Case* (*supra*), that these questions must be answered in the negative. Mr. Justice Strong, who delivered the opinion of the court, observed that the repeal of the 36th section of the act of 1863 by the substituted act of 1864 "was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors;" and that a by-law founded upon the 36th section of the act of 1863 was "a regulation inconsistent with the new currency act, *the policy of which was to permit no liens in favor of a bank upon the stock of its debtors.*" It was there argued for the bank that, though the act of Congress does not itself create a lien on a debtor's stock, (as did the act of 1863), it does by its fifth section authorize the creation of such a lien by the articles of association, and by by-laws made under them. But it was answered that the words of the fifth section would bear no such meaning and that a by-law giving to the bank a lien

upon its stock, as against indebted stockholders, ought not to be considered as one of those regulations of the business of the bank, or for the conduct of its affairs, which it was authorized to adopt, and that Congress evidently did not understand the section as extending to the subject of stock transfers; because in another part of the statute express provision was made for them.

The doctrine of *Lanier v. The Bank* was followed in this
47 court in *Conklin v. Second Nat. Bank*, (45 N. Y. 655); where the stock certificates contained the statement that the stock was not transferable "until all liabilities of the stockholder to the bank are paid." The rule of the *Lanier* case was held applicable to the transaction between the bank and the plaintiff's assignor, and it was held, against the claim of the bank to a lien upon the stock for moneys due from the stockholder, that "where the statute has prohibited all express agreements between a bank and its stockholders for a lien in favor of the former upon the stock of the latter, to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank, is too clear to require discussion."

Do the cases which are cited and relied upon below as establishing a new doctrine apply to the present case and come to the support of the defendant's position? They are *Bank v. Matthews* (98 U. S. 621) and *Bank v. Whitney* (103 *ib.* 99). The national banking law authorizes a national banking association to loan money on personal security, and then declares that "it may purchase hold and convey real estate for the following purposes, and no others; *first*, such as may be necessary for its immediate accommodation in the transaction of its business; *second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; *third*, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; *fourth*, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it." In the case of *Bank v. Matthews* — and another person had given their joint note to a mercantile company and secured it by a deed of trust covering certain real property, executed by Matthews alone. Subsequently, the company assigned the note and deed of trust to the defendant bank to secure a loan made at the time. The loan was not paid and the bank directed the
48 trustee to sell. In the State courts Matthews obtained a perpetual injunction against the sale, upon the ground that the loan was made upon real estate security, which was forbidden by the statute, and the deed of trust was, therefore, void. The case was taken by writ of error to the United States Supreme Court, where the decree of the State court was reversed and the cause remanded, with direction to the court below to dismiss the bill. It was held that the prohibitory clause of the national banking law did not vitiate real estate securities taken for loans, and that a disregard of the law only laid the association open to proceedings by the Government. Justice Swayne remarked that "The impending

danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress." The guiding principle of the decision, however, was that it would be inequitable that a borrower should be rewarded, by giving success to his defense of the invalidity of the bank's act in taking a prohibited security for its loan, and that, as a punishment was prescribed for the violation of its charter, it was for the Government to object. (See p. 629.)

In *Bank v. Whitney*, Whitney had executed a mortgage to the bank, which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him and for his other indebtedness then due, or thereafter to become due. The question for determination was stated to be whether the mortgage was valid so far as it applied to future advances to him. The question was regarded as determined by the decision in *Bank v. Matthews*, which was reviewed in the opinion. It was observed that, "Whatever objection there may be to it, as security for such advances, from the prohibitory provisions of the statute, the objection can only be urged by the Government." In both of these cases, the bank held the trust deed, or mortgage, and was endeavoring
49 to enforce the security which it actually had taken from its debtor.

In *Bank v. Stewart*, (107 U. S. 676), the bank had taken, as security for a debt due from the stockholder, thirty shares of its own stock and, upon default in payment, *had sold the same and applied the proceeds in payment of the debt*. The action was brought to recover back the proceeds of the sale, upon the ground that the bank had no right to take the security. The right to recover was denied, upon the ground that "the contract had been executed, the security sold and the proceeds applied to the payment of the debt," and that "both bank and borrower are in such case equally the objects of legal censure and they will be left by the courts where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiffs had affirmed the sale and the moneys loaned were an offset to the proceeds.

In Thompson *v.* Bank, (146 U. S. 240), the question arose upon the overcertification of a check, in violation of the United States statute; which made it "unlawful for any officer, etc., of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check." The ststute, further, provided that any check so certified shall be a good and valid obligation against said bank; but that any officer, etc., violating the provisions of the act would subject the bank to proceedings on the part of the comptroller for the appointment of a receiver to wind up the affairs of the association. (13 Stat. 114, c. 106.) The action was brought to recover the possession of certain railroad bonds, which the bank was charged with having become illegally possessed of. The bank answered that the bonds had been pledged to

it as collateral security for call loans or advances, and that the pledgors having failed to pay their indebtedness, the
50 *bonds had been sold under an agreement* permitting the bank to do so upon the pledgor's default. The question was, whether, inasmuch as the defendant had certified checks without having on deposit an equivalent amount of money to meet them, it became a *bona fide* holder of the bonds. Upon the authority of the cases of *Bank v. Matthews* and *Bank v. Whitney*, it was held that "where the provisions of the national banking act prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions *which have been executed*, their validity can be questioned only by the United States, and not by private parties." This clause from the opinion is quoted below in the present case, but I fail to perceive its precise applicability. The transaction, as in *Bank v. Stewart*, had been executed. *Matthews v. Bank* and *Bank v. Whitney*, only of these cases, might be claimed to have a bearing upon the discussion; but their analogy is not apparent. I do not think that the United States Supreme Court intended to announce any new rule; for they simply applied a doctrine established as early as in the case of *Fleckner v. Bank*, (8 Wheaton, 339). That the *Matthews* and *Whitney* cases have not overruled the doctrine of the *Lanier* and *Bullard* cases, or of the *Conklin* case in this court, with respect to the enforcibility of such a by-law as the bank had in this case, is the general understanding of text-writers and it has been so understood by courts. (Cook on Stockholders, 3d ed., sec. 533; Jones on Liens, 2d ed., ≠ 384; Thompson's Commentary on the Law of Corporations, ed. of 1894, §2319; Paine's Banking Laws, p. 533; American & English Enc. of Law, vol. 16, p. 533; American & English Enc. of Law, vol. 16, p. 201, ≠≠ 14, 15; *Evansville National Bank v. Metropolitan National Bank*, 2 Bissell, 527; *Continental Bank v. Eliot Bank*, 7 Fed. Rep. 376; *New*
51 *Orleans National Banking Association v. Wilts*, 10 Fed. Rep. 330; *Feckheimer v. Nat. Ex. Bank of Norfolk*, 79 Va. 80.)

I do not understand that, by virtue of any rule established in the *Matthews* and *Whitney* cases, a national banking association is enabled, by force of a by-law, or by a notice upon certificates, to restrict the transferability of its stock by imposing a lien thereon for any liability owing to it by its stockholder. How can it reserve to itself a right to a lien upon shares of its own stock, in contravention of the provisions of the national banking act, and become entitled to demand of the courts to enforce it as against a purchaser of the shares, whose title thereto is acquired *bona fide* and for value? If the defendant bank can successfully insist upon the right to an equitable lien, which the courts must enforce, in the face of the statutory prohibition, then I do not see that certificates of capital stock in national banking associations will possess that marketable character, which has been considered to give them a greater value as investments. The transferability of the stock is one of the most valuable franchises conferred by Congress upon banking associations, as it was said by Justice Davis in the *Lanier* case. The learned

judge further remarked, in that case: "It is no less the interest of the shareholder, than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." Nor can it be said that this plaintiff, when offered by Levi the certificates of stock as collateral security for a loan of money, was chargeable with notice of any lien of the bank thereon. The certificates were in his possession, and were delivered to the plaintiff, and the printed matter thereon was of no importance; inasmuch as the public law, under which the bank was organized, prohibited it from making
52 any loan or discount on the security of the shares of its own capital stock. The plaintiff could not be bound by notice of something which the law prohibited.

The plaintiff, in the language of Justice Davis in the Lanier case, was "told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in the possession of the certificates."

If the case had been one where the bank, not regarding the prohibition of the banking act, had taken from Levi his certificates of stock, as collateral security for the payment of any indebtedness which he had incurred, or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or any one claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Bank v. Matthews* or *Bank v. Stewart*. If the bank had violated the law, it laid itself open to proceedings on the part of the Government and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors.

There is no conflict between the Lanier and Bullard cases and the Matthews and Whitney cases. Each class is distinct and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed and to avoid it would be to deplete the assets of the bank to the amount represented by
53 the contract; it is quite another thing, where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute, which provides that it shall not have such a lien, or take such a security.

The conclusion I reach is that the cases relied upon in the court below, in the decision of this case, do not control it. They do not authorize the assertion of an equitable lien by the bank upon the shares of its own capital stock and the plaintiff, having acquired

the certificates from Levi, the stockholder, for value and in good faith, was entitled to have the same absolutely transferred into its name upon the books of the corporation.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Parker, Ch. J., Bartlett, Martin, Vann, Cullen and Werner, JJ., concur.

Judgment reversed, etc.

54 [Endorsed:] In the court of appeals, State of New York. Buffalo German Insurance Co. against Third National Bank of Buffalo Copy. Opinion. Lewis & Lewis, appellant's attorneys, 23–25 Erie Co. Savings Bank building, Buffalo, N. Y.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the hon. judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court of appeals, State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Buffalo German Insurance Company, plaintiff, and The Third National Bank of Buffalo, N. Y., defendant, wherein was drawn in question, the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such, their validity; or wherein was drawn in question, the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said defendant, The Third National Bank of Buffalo, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid,

56 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of September, in the year of our Lord one thousand nine hundred and two.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the United States Circuit Court
for the Second Circuit.

Allowed, (to operate as a supersedeas,) by
ALTON B. PARKER,
Chief Judge of the Court of Appeals, State of New York.

57 In the Supreme Court, United States.

THE BUFFALO GERMAN INSURANCE COMPANY
against
THE THIRD NATIONAL BANK OF BUFFALO.

To the honorable chief judge of the court of appeals of the State of New York:

The petition of the Third National Bank of Buffalo respectfully shows:

That on the 11th day of June, 1902, the court of appeals of the State of New York rendered a judgment against your petitioner in a certain case wherein The Buffalo German Insurance Company was plaintiff, and your petitioner was defendant, affirming the judgment of the appellate division, fourth department, which affirmed the judgment of the supreme court in this action, whereby it was adjudged that by and through the pledge of one Emanuel Levi, to the plaintiff, The Buffalo German Insurance Company, of certain shares of the capital stock of the defendant, numbered B 58 for 100 shares, B 59 for 100 shares, B 60 for 100 shares, B 61 for 100 shares, and B 62 for 50 shares, said shares being of the par value of $100.00 each, the plaintiff became and was the owner of each and all of said shares of stock and was and is entitled to a transfer of said stock on the books of the defendant, your petitioner, upon said certificates being tendered for surrender and cancellation, and whereby it was further ordered and adjudged that the dividends declared by the defendant, your petitioner, in July, 1896, and since then down to the trial of this action in said supreme court, Erie county, amounting to the sum of $12,135.83 belong to and are the property of the plaintiff, and whereby it was fur-
58 ther ordered and adjudged that upon the tender of said certificates, or any of them, by the plaintiff or its agents or assigns to the defendant, your petitioner, the defendant, your petitioner, shall, upon the request to do so, transfer the said certificates of stock, and each and every of them, on the books of the defendant, your petitioner, to the plaintiff, or its agents or assigns as it may direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns, and

whereby it was further ordered and adjudged that the plaintiff, The Buffalo German Insurance Company, recover of the defendant, your petitioner, The Third National Bank of Buffalo, the sum of $12,135.83 being the amount of dividends on said stock to the date of said trial in the supreme court, Erie county, together with the sum of $1391.44, costs and disbursements, and awarded execution thereon, as will appear by reference to the record of the proceedings of said cause.

That the said court of appeals is the highest court in the State of New York in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States authorizing writs of error to State courts, and especially section 709 of the Revised Statutes of the United States, providing that a final judgment or decree in any suit in the highest court in the State in which a decision in the suit could be had, where it has drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision is against their validity, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority, may be re-examined or reversed or affirmed in the Supreme Court, upon a writ of error, and because it has ap-

59 peared in the court below that this defendant, your petitioner, is a national banking corporation, organized and existing under an act of Congress authorizing the formation of national banks, which became a law in 1864, and under which your petitioner was incorporated in 1865, and that one Emanuel Levi was the owner of 450 shares of the capital stock of the defendant, evidenced by certain certificates of stock issued to him, and which bear the date, July 2nd, 1888, and it appeared upon the said certificates that it was stated therein that no transfer of the stock of your petitioner, the Third National Bank of Buffalo, shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association, either as principal debtor or otherwise, and that such liability shall be a lien upon the said stock, and upon all profits thereof and dividends.

And it further appeared that Emanuel Levi in December, 1890, borrowed from the Buffalo German Insurance Company the sum of $25,000.00, and on April 13, 1891, the sum of $20,000.00, and on May 25th, 1892, the sum of $10,000.00, giving for such sums his demand notes therefor, and transferring the said certificates of stock owned by him in this defendant, together with an assignment thereof, by which he assigned the same as collateral security for the payment of said loans, and that on June 19th, 1896, there was due and unpaid on said loans $55,000.00 principal, and $300.00 interest, and that thereafter the Buffalo German Insurance Company notified the executors of the said Emanuel Levi, requesting the payment of said loans, and the redemption of said stock before the 16th day of June, 1896, and thereafter served notice of sale upon the executors of said Levi for the sale of the said stock on the 30th day of June,

1896, and posted notices of such sale in three public places in the city of Buffalo, and that on the said day at the time specified offered for sale at public auction said certificates of stock, and were
60 sold to the plaintiff, The Buffalo German Insurance Company, for the sum of $44,000.00, that being the highest sum bid therefor, and thereafter, through its secretary, took the certificates of stock to the defendant, your petitioner herein, and demanded that the stock be transferred on your petitioner's books from said Emanuel Levi to the Buffalo German Insurance Company.

That at the time of the sale of the stock in question and its purchase by the Buffalo German Insurance Company, the estate of Enamuel Levi was largely indebted to your petitioner, and at the time of said sale this defendant, your petitioner claimed and now claims it has the right to a lien upon said certificates of stock as security for the payment of such indebtedness. That said Emanuel Levi's indebtedness to this defendant, your petitiones, accrued prior to the pledging of said certificates of stock to the plaintiff, The Buffalo German Insurance Company. That no tender or offer to pay said indebtedness to this defendant has been made by the Buffalo German Insurance Company, or by any other parties or persons, and that the said plaintiff, The Buffalo German Insurance Company, was notified of your petitioner's claim immediately before the sale on June 30th, 1896, and your petitioner forbade such sale except subject to its claims, demands and liens upon said stock.

That this defendant, your petitioner, was organized in February, 1865, by articles of association approved by the Comptroller of Currency at Washington; that such articles of association contained the following clause:—

"That the board of directors shall have power to make all by-laws that may be proper and convenient for them to make under said act for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the director shall so determine, the transfer of stock owned by any stockholder, who may be liable to this association, either as principal debtor or otherwise, without the consent of the board."

That on the 18th day of February, 1865, your petitioner's
61 board of directors adopted by-laws, among which is the following:

"The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfer of stock shall be made.

"No transfer of stock in this association shall be made without the consent of the board of directors, by any stockholder who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof, and dividends and certificates of stock shall contain upon them notice of this provision."

That on the 1st day of October, 1890, Emanuel Levi was indebted to the defendant, your petitioner, in the sum of 31,000.00, which had

existed in whole or in part since 1890; that your petitioner held promissory notes of Emanuel Levi on that day for that amount, and on that day the said Levi obtained a further loan of $12,000.00 from this defendant, your petitioner, secured by a note made by himself and endorsed by Louis Levi his son, and proposed to leave and deliver to your petitioner the stock which he owned in your petitioner, which was then in the safe deposit vaults of the Buffalo Trust Company, as security for the indebtedness of $31,000.00, and the $12,000.00 then loaned. That you petitioner, in reliance upon the said additional and further security, made said loan for $12,000.00, and extended the time of payment of the old indebtedness of $31,000.

Your petitioner claims it had and has a valid and subsisting lien on said stock and all the dividends thereof, and the right to apply said dividends to the extinguishment of the balance due it from the estate of Emanuel Levi, contracted herein, as set forth.

62 That the court of appeals of the State of New York has decided that the said Buffalo German Insurance Company by and through the said pledge of stock to it by said Levi on the 30th day of June, 1896, became and was the owner of said certificates of stock, and of all of them, and entitled to a transfer on the books of your petitioner, and the dividends declared upon said stock since July, 1896, amounting to $12,135.83, belonged to the said Buffalo German Insurance Company, and that the said Buffalo German Insurance Company is entitled to have the same transferred upon the books of your petitioner, and is entitled to recover the sum of $12,135.83, and $1391.44 costs.

That your petitioner prays for a writ of error to bring up the record in this action from the court of appeals of the State of New York to this court, that the proceedings thereon may be reviewed, and that your petitioner alleges that error has been made in the decision of said cause by the court of appeals, and it prays that the same may be corrected in this court, and that the lien of your petitioner may be adjudged to be a valid and subsisting lien under and by virtue of the statutes of the United States relative to the incorporation and existence of national banks, and under the statutes by virtue of which your petitioner was organized and exists, all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error returnable to the Supreme Court of the United States and for citation and supersedeas, and it will ever pray.

Dated, Buffalo, N. Y., August 12th, 1902.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y.,
By CHARLES A. SWEET, *President.*

63 STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

Charles A. Sweet, being duly sworn, doth depose and say: That he is the president of the defendant and petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, excepting as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES A. SWEET.

Sworn to before me, this 12th day of August, 1902.
WILLIAM C. CARROLL,
Commissioner of Deeds in & for Buffalo, N. Y.

64 [Endorsed:] In the supreme court of the United States. Buffalo German Insurance Co. against Third National Bank of Buffalo, N. Y. Original petition and writ of error. Lewis & Lewis, defendant's attorneys, 23–25 Erie Co. Savings Bank building, Buffalo, N. Y.

65 In the Court of Appeals of the State of New York.

BUFFALO GERMAN INSURANCE CO., Plaintiff & Respondent, }
against
THIRD NATIONAL BANK OF BUFFALO, Defendant & Appellant. }

The defendant and appellant, Third National Bank of Buffalo, assigns the following errors in the final decision of this court, filed herein upon the 10th day of June, 1902.

I. The court erred in holding and deciding that the plaintiff by and through the pledge of stock and the sale thereof, on the 30th day of June, 1896, became and was the owner of said certificates of stock, and each and all thereof, and was entitled to a transfer thereof on the books of the defendant.

II. The court erred in finding that the dividends declared on said stock by the defendant, on and since July, 1896, belonged to and are the property of the plaintiff, in the amount with interest, of the sum of $12,135.83.

III. The court erred in holding and deciding that the plaintiff is entitled to have the said stock transferred on the books of the defendant to the plaintiff, and to recover of the defendant the sum of $12,135.83 and the costs of the action.

IV. The court erred in not ordering and adjudging that the judgment of the supreme court of the State of New York, granting to the plaintiff the relief asked in its complaint and adjudging that the plaintiff, upon the tender of the certificates of stock de-
66 scribed in the complaint, or any of them, by the plaintiff, or its agents or assigns, to the defendant, upon request so to do, transfer said certificates of stock and each of them, on the books of the defendant to the plaintiff, or its agents or assigns, as it may

direct, and issue new certificates of stock therefor to the plaintiff, its agents or assigns, and further ordering and adjudging that the plaintiff recover of the defendant the sum of $12,135.83, together with the sum of $1391.41 costs, should be reversed, and that the plaintiff's complaint be dismissed.

V. The court erred in denying to the defendant the rights claimed by it, under the laws of the United States relating to national banks and under which the said defendant was organized and existed, and the rights claimed by it under its charter and its by-laws, made in accordance with the said laws of the United States relating to national banks, and in denying to the said defendant any relief on that ground.

VI. The court erred in not holding and adjudging that the shares of stock described in the complaint, were and are held by the plaintiff, subject to the lien of the defendant thereon, in the sum of $9886.33, as of February 14th, 1900.

VII. The court erred in denying to the defendant, the right claimed by it in its answer and in this action, to extinguish its said lien upon said stock in the sum of $9886.33, as of February 14th, 1900, from the dividends declared upon said stock by The Third National Bank of Buffalo, the defendant herein, from time to time.

VIII. The court erred in deciding against the validity of The statutes of the United States and the authority exercised under said statutes, pursuant to which this defendant claims a lien upon said certificates of stock in said defendant, which is also claimed by the plaintiff.

LEWIS & LEWIS,
Attorneys for Defendant.

67 [Endorsed:] In the court *court* of appeals, State of New York. Buffalo German Insurance Co., respondent against Third National Bank of Buffalo, appellant. Original Assignment of errors. Lewis & Lewis, appellant's attorneys, 23-25 Erie Co. Savings Bank building, Buffalo, N. Y.

68 To the Buffalo German Insurance Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein The Third National Bank of Buffalo, N. Y., is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York, this 18th day of September in the year of our Lord, one thousand, nine hundred and two.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the State of New York.

69 STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

On this 26th day of September 1902, personally appeared William C. Carroll before me, the subscribed, and makes oath that he delivered a true copy of the within citation to the Buffalo German Insurance Company, by delivering the same to and leaving the same with, Oliver J. Eggert, president of said company.

WILLIAM C. CARROLL.

Subscribed and sworn to before me, this 26th day of September, 1902.

[Seal of J. Allen Keeney, Notary Public, Erie County, N. Y.]

J. ALLEN KEENEY,
Notary Public, Erie County, Com'r of Deeds in and for Buffalo, N. Y.

70 [Endorsed:] Supreme Court of the United States. Buffalo German Insurance Company against Third National Bank of Buffalo Original Citation Lewis & Lewis, appellant's attorneys, 23–25 Erie Co. Savings Bank building, Buffalo, N. Y.

71 STATE OF NEW YORK:

Court of Appeals, Clerk's Office.

I, W. H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that the annexed papers are copies of the return on appeal to the court of appeals, and of the whole thereof upon which the said court acted in rendering judgment herein, and of the judgment of said court and of the opinion thereof rendered on a former appeal herein, and that the same are true and correct copies of the originals remaining on file in this office, together with original petition, writ of error, assignment of errors and citation to the Supreme Court of the United States, and the whole thereof constituting the return to the writ of error herein.

Seal State of New York Court of Appeals.

In witness whereof, I have hereunto set my my hand and affixed the official seal of the court at the city of Albany, this twenty-ninth day of September, A. D., one thousand nine hundred and two.

W. H. SHANKLAND, *Clerk.*

Endorsed on cover: File No. 18,706. New York court of appeals. Term No. 146. The Third National Bank of Buffalo, N. Y., plaintiff in error, *vs.* The Buffalo German Insurance Company. Filed October 21st, 1902.

13309

SUPREME COURT OF THE UNITED STATES.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y.,
Plaintiff in Error,

vs.

THE BUFFALO GERMAN INSURANCE COMPANY.

BRIEF OF PLAINTIFF IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Statement.

This case comes to this Court upon a writ of error to the Court of Appeals of the State of New York. Such writ of error brings to this Court for review a judgment of that Court affirming the order and judgment of the Appellate Division of the Fourth Department, which in turn affirmed the judgment entered on the findings of Mr. Justice Lambert of the Supreme Court of the State of New York; such first mentioned judgment having been so entered in Erie County Clerk's Office October 16th, 1900.

The Judgment Here for Review.

The judgment is a judgment in an action in equity, whereby it is adjudged "that by and through the pledge of Emanuel "Levi to the plaintiff, of the capital stock of the defendant, "evidenced by the certificates of stock of the defendant, num-"bered B 58," etc., "and the sale thereof by the plaintiff on the "30th day of June, 1896, the plaintiff became and was the owner "of each and all of said certificates of stock, and was and is

"entitled to a transfer thereof on the books of the defendant;" also "that the dividends" thereon "amounting to the sum of "$12,135.83, belong to and are the property of the plaintiff;" also "that upon the tender of said certificates * * * the "defendant shall, upon request so to do, transfer the said cer- "tificates of stock * * * on the books of the defendant, "to the plaintiff." (Record, p. 16.)

Facts.

Enough has been said about the claims of the parties and the language of the judgment rendered, to make apparent the necessity for a clear understanding of the precise facts here involved. Fortunately, those facts are not in dispute, but were found by the Trial Court, and may be briefly stated to this Court.

The plaintiff in error became a national bank in 1865, and Emanuel Levi thereafter became the owner of 450 shares of its capital stock. (*P. 11, Findings I and II.*)

These shares of capital stock were not issued to Mr. Levi until 1888, but were in the form following:

"Number B–60. Shares 100.

"STATE OF NEW YORK,

"THIRD NATIONAL BANK OF BUFFALO.

"*This is to certify* that Emanuel Levi is the owner of one "hundred shares, of one hundred dollars each, of the capital "stock of the Third National Bank of Buffalo, subject to the lien "or liens referred to in section fifteen of the by-laws of said bank "in the following words:

"'No transfer of the stock of this association shall be made "'without the consent of the board of directors, by any stock- "'holder, who shall be liable to the association either as principal "'debtor or otherwise, which liability shall be a lien upon the "'said stock and all profits thereof and dividends.'

"And that the said stock is transferable only on the books of "the bank by him or his attorney on the surrender and cancel- "lation of this certificate and compliance with said by-laws.

"Dated, Buffalo, N. Y., this 2d day of July, 1888.

"CHARLES A. SWEET, President.

(*Finding II, p. 11.*) "N. ROCHESTER, Cashier."

The certificates of stock were issued in this form, pursuant to a by-law of the Board of Directors of the bank adopted February 18th, 1865, which reads as follows:

"Transfers of stock.—Sec. 15. The stock of this bank, shall be "assignable only on the books of this bank subject to the restric- "tions and provisions of the act, and a transfer book shall be "kept in which all assignments and transfers of stock shall be "made. No transfer of the stock of this association shall be "made without the consent of the board of directors by any "stockholder who shall be liable to the association either as "principal debtor or otherwise, which liability shall be a lien "upon the said stock and all profits thereof, and dividends and "certificates of stock shall contain upon them notice of this pro- "vision." (*P. 13, Finding XIV.*)

This by-law was authorized by the Comptroller of the Currency February 9th, 1865. (*P. 13, Finding XIII.*)

The transaction between Levi and the Bank in which he was thus a stockholder, did not rest simply on the by-laws and the shares of stock, as to security, as appears from the finding of the Court:

"That on the 1st day of October, 1890, the said Emanuel Levi "was indebted to the defendant in the sum of thirty-one thous- "and dollars, which had existed, in whole or in part, since May "1st, 1890, and as security for the payment thereof, the said "defendant held promissory notes of the said Emanuel Levi. "That upon the 1st day of October, 1890, the said Emanuel Levi "applied for a further loan of twelve thousand dollars, and pro- "posed to secure the same by note made by himself and endorsed "by his son, Louis Levi, and to treat and consider as delivered "to the defendant the stock which he owned in the defendant "corporation, and which was then in the safe deposit vaults of "the Buffalo Loan and Trust Company as security for the pay- "ment of the said indebtedness of thirty-one thousand dollars, "and the loan that day made; and that thereupon, and in "reliance upon such further and additional security for the pay- "ment of the indebtedness and the endorsement of the paper of "the said Emanuel Levi of twelve thousand dollars by his son, "Louis Levi, the said defendant made the said loan of twelve

"thousand dollars and extended the time of payment of the "thirty-one thousand dollars old indebtedness." (*Finding XV, pp. 13–14.*)

The loans of the Insurance Company were made still later, and December 3d, 1890, for $25,000; August 13th, 1891, for $20,000; and May 25th, 1892, for $10,000; Emanuel Levi, in violation of his agreement with the Bank, delivering to the Insurance Company "all of the certificates hereinbefore mentioned, together with an assignment and receipts," as collateral security. (*Findings III, IV & V, pp. 11 & 12.*) They were not then in fact transferred on the books of the Bank. The contrary is found.

The Court expressly finds:

"That said plaintiff did not at any time until June 30, 1896, "demand of said defendant a transfer of said stock, or any part "thereof, or the payment to it of any dividend thereon." (*P. 15, Finding XVIII.*)

The Court finds that the dividends declared on and after July 1st, 1896, after the demand was made therefor, amount to $12,-135.83. (*Finding XIX, p. 15.*)

The Court finds that June 30th, 1896, the Insurance Company assumed to sell these certificates of stock on notice to the Bank, and to purchase the same upon the sale thereof, and thereupon demanded of the Bank the transfer thereof on its books, and that dividends be paid to the Insurance Company. (*Findings VIII to XII, pp. 12 & 13.*)

Opinion of the Court of Appeals.

The opinion of the Court of Appeals upon which this judgment is rendered, is reported in 162 N. Y., 168, and appears in this record, beginning at page 22. This opinion resulted in the reversal of a previous judgment of the Supreme Court of the State of New York, and of the Appellate Division of the Supreme Court for the Fourth Department, 29 App. Div., 137. When this case was tried the second time before Mr. Justice Lambert, as the consequence of the Court of Appeals decision, he found the facts quite fully and more favorably to the Bank than they were found on the previous trial, but, deeming himself concluded by the

opinion of the Court of Appeals, decided the case against the Bank upon the law.

The opinion of the Court of Appeals gives such a construction to the Act of Congress, as amended in 1864, that the Bank is denied any claim upon the stock to secure the loan to Emanuel Levi, and the Insurance Company is permitted to acquire title to Emanuel Levi's stock by virtue of a *subsequent* lien thereon.

The Bank insists that there is nothing in the Act of Congress that required the Court to deprive it of its lawful rights, or that required the Court of Appeals to give the Insurance Company an advantage over it which the Insurance Company is not entitled to as the mere assignee of Levi, and *subsequent* in time and in right. Plaintiff in error insists, that, it not being found that the Insurance Company was a *bona fide* encumbrancer, or took without notice of the Bank's rights, it follows the Insurance Company stands in the shoes of Levi.

Errors.

The Bank excepted to the conclusions of law of Justice Lambert at the Trial Term. Those exceptions bring up the question of whether or not the Insurance Company, by virtue of anything in the Act of Congress, was entitled to the judgment ordered by the Court upon the facts found by the Court. (*Pp. 15, 16, 17, especially exceptions bottom p. 16, top of p. 17.*)

Errors Assigned.

1. The essence of the first error assigned is the conclusion of law, as to the stock certificates involved, that the Insurance Company "was entitled to a transfer thereof on the books of the "defendant."

2. The essence of the second error is that "the dividends "declared on said stock * * * since July, 1896, belong to "and are the property of the plaintiff * * * of the sum "of $12,135.83."

3. The essence of the third error is that "the plaintiff is "entitled to have the said stock transferred on the books of the "defendant * * * and to recover * * * $12,135.83."

4. The essence of the fourth error is that the Court of Appeals erred because it did not reverse the judgments of the courts below and order "that the plaintiff's complaint be dismissed."

5. The essence of the fifth error is that the Court erred in denying the defendant "rights claimed by it under the laws of *the United States relating to national banks.*"

6. The essence of the sixth error is that the Court erred in not holding that the shares of the stock in question were subject to the Bank's claim thereon "in the sum of $9,886.33."

7. The essence of the seventh error is that the Court erred in not requiring the Insurance Company to extinguish the Bank's claim for $9,886.33 before requiring the Bank to transfer the stock in question upon its books.

8. The essence of the eighth error is that the Court decided against the authority exercised under the statutes of the United States, pursuant to which the Bank claims security upon the certificates of stock in question. (*Record, pp. 35, 36.*)

Broadly, the Bank's position may be succintly stated like this: The Bank was authorized to issue stock subject to the transfer conditions prescribed by its articles of association, by-laws, and certificates of stock. It was the lawful right of the Bank to do business under the Act of Congress and to require Emanuel Levi, when he requested an extension of time and an additional loan, to give it security upon his shares in the Bank, as a condition of granting his request. The Act of Congress does not forbid a bank from entering into such an arrangement at such a time, with a stockholder, and does not give the Insurance Company the right thereafter to make a loan upon the same stock and ignore the Bank's rights with respect thereto.

A national bank has the same business rights as any other business corporation. It should not be deprived of a lawful claim upon its stock, lawfully obtained for a lawful purpose. Nothing in any Act of Congress, or any decision of this Court, requires such a decision as that made in the court below. It is not just.

POINTS.

I.

The plaintiff in error, by its articles of association, its by-law, and the certificate of stock, gave notice to all the world of its claim on the stock. It further obtained an equitable lien on the stock of Emanuel Levi by the arrangement entered into with him, which he, or his estate, could not dispute. The Insurance Company had notice of the Bank's claim, in the stock itself, and the Insurance Company as the assignee of Emanuel Levi, stands in his shoes, and is estopped from claiming any greater rights than Emanuel Levi, or his estate, would have had in the stock in question.

(*a*) *The Bank's Position.*

The justice of the Bank's claim is clear. Emanuel Levi was a large stockholder in the bank. This bank had been organized in 1865. Its articles of association had been approved of by the Comptroller. These articles of association contain this express provision:

"No transfer of the stock of this association shall be made "without the consent of the board of directors by any stockholder "who shall be liable to the association either as principal debtor "or otherwise, which liability shall be a lien upon the said stock "and all profits thereof, and dividends and certificates of stock "shall contain upon them notice of this provision." (*P. 13, Finding XIV.*)

This provision was inserted in the certificate of stock. When Emanuel Levi acquired his stock, he knew such stock contained this provision. By acquiring stock with such a provision in it, he assented to the terms and conditions thereof. Further than that, by acquiring stock in a national bank, which contained a by-law to the same effect, he assented to the terms and conditions of that by-law. In addition to this, when he applied for an extension of time on a loan that had been made to him, and for a further loan of money, it was expressly understood between him and the President of the bank that the bank should have a lien

upon this stock as the condition of such extension and such loan. That the President of the bank, who was not a lawyer, supposed that he was fully protected by this by-law and this certificate of stock, and this understanding with Levi, is clear from the fact that he did not require these certificates of stock to be brought in, although he did require certificates of stock in another bank to be brought in, as collateral security to the loan made. That certificate of stock in the other bank has been sold and the proceeds applied on this loan. The loan being only partly paid, the bank proceeded to apply the dividends on this stock to the satisfaction of this loan.

Upon the other hand, the Insurance Company took this certificate of stock with notice of this situation, because that notice is contained in the certificate of stock itself. The Insurance Company took the certificate of stock with notice of the situation, because a party acquiring stock in a corporation takes with legal notice of the by-laws of the association and of the powers of the directors of such corporation. If such by-laws give the directors power to refuse to transfer stock while a stockholder is indebted to the bank, a party acquiring the stock in such a bank is bound to take notice that the directors of the bank have this power. It matters not whether a lien can be created on the stock itself by the by-law, for if the directors have the power to refuse to transfer the stock while the stockholder is indebted, such power is a perfect defense to an action to compel them to transfer the stock in a case of this charactor. Stock in a corporation is not negotiable paper, and has only a few characteristics of negotiable paper. Such stock is personal property, and salable like similar personal property. A person buying stock in a corporation is bound to know its general powers by statute, the powers of its directors under by-laws, and the terms and conditions upon which stock may be transferred upon its books. A person buying stock in a corporation cannot compel the corporation to transfer stock upon its books contrary to its by-laws. If the stock is *silent* as to any by-law, or any power of the directors, a nice question may arise as to a bona fide purchaser of the stock.

This case does not differ in substance from the case of *Knight vs. Old National Bank, 3 Cliff., 429.* That case was so carefully considered, and the authorities, state and national, were so

patiently examined, and so intelligently commented upon in the opinion there delivered, that I call particular attention to it. Instead of writing and printing a great deal, I beg to make extracts sufficient to show the character of the case and the points in it upon which the Court laid stress. That was a case where the bank in question was organized under the Act of June 3d, 1864, precisely as the Third National Bank here was organized under the same Act, and probably at about the same time. The defense there interposed to the action was the same as that here interposed. This sufficiently appears from the following extracts from the statement of the case (*pp. 430, 431*):

"The defendants justified their refusal to allow the stock to be "entered upon their books as transferred, upon the ground that "the proprietor and assignor of the stock was indebted to the "Bank, that the Bank, at the time of the assignment, and of the "demand, held two bills of exchange, drawn by Dorr and Mor-"gan, and accepted by the firm, of which the holder and assignor "of the stock was a copartner in trade. * * * *

"Provision was made in the articles of association that the "board of directors should consist of eight stockholders, and that "a majority of the directors should constitute a quorum to do "business, and that the directors should have power to make all "by-laws that might be proper and convenient for them to make "under said act for the general regulation of the business of the "association, and the entire management and administration of "its affairs, which by-laws might prohibit, if the directors should "so determine, the transfer of stock owned by any stockholder "who might be liable to the association either as principal or "debtor, or otherwise, without the consent of the board.

"On the 10th of January, 1867, the board of directors, seven "being present, adopted the following by-law: 'That no person "'indebted to the Bank shall be allowed to sell or transfer his or "'her stock without the consent of a majority of the directors, "'and this whether liable as principal or surety, and whether "'the debt or liability is due or not.'"

In giving his reasons for the decision there rendered, Clifford, J., there said (*p. 433*):

"Provisions to the same effect were also contained in the "charter of the Bank of Washington, and the same court, twenty "years later, held, in a contest between The United States and "the Bank, that every shareholder of a bank who draws or in- "dorses a note to procure a loan from the bank, is bound to "know the terms of the charter and by-laws; and his signature, "if it is so provided in the charter, is an inchoate pledge of his "stock as security for such paper; that his stock gives credit to "the loan, and that the bank under such circumstances grants "the loan on the faith of that security. (*Brent, etc., vs. Bank of "Washington, 10 Pet., 615.*)"

Speaking of the by-laws which prevented the stockholder from transferring his stock while indebted to the Bank, in that case, the Court further said (*pp. 436-437*):

"They were authorized by the articles of association in this "case to adopt the by-law in question, and it is expressly admit- "ted in the case of *Rosenbach vs. The Salt Springs National Bank, "53 Barb., 505*, that where the articles of association confer the "power to make such a by-law, that the by-law is valid, and "that it binds the subsequent purchaser of the stock, and the "court is not referred to any decision where a contrary doctrine "is mentioned. Comment upon the provisions of the prior act "of Congress is unnecessary, as that is repealed, and the case "before the Court is governed entirely by the act now in force. "(*12 Stat. at Large, 665; 13 Ibid., 118.*)"

As to the argument here made that the Banking Act forbids the bank to loan on the security of its own shares, the Court there said (*pp. 437, 438, 439*):

"Banking associations, formed under the act of Congress, are "forbidden by section 35 of the act to make any loan or discount "on the security of the shares of its own capital stock, or to be "the purchaser or holder of any such shares, unless such security "or purchase shall be necessary to prevent loss, upon a debt pre- "viously contracted in good faith. (*13 Stat. at Large, 110.*)

"Just such a provision is contained in the banking law of the "State of Connecticut, where it is enacted that no bank shall "make any loan or discount on pledges of its own stock, and the

"Supreme Court of that State held that that enactment did not "invalidate a provision in the certificates that the stock of the "shareholders should be subject to their indebtedness to the in- "corporation, that a loan or discount on a pledge of stock is an "expression of mercantile origin, and is understood to mean a "loan or discount, where the stock of the person for whose bene- "fit the loan or discount is made, or that of another is expressly "and specifically pledged at the time for its payment. *Van Sands "vs. Middlesex Co. Bank, 26 Conn., 144.* Such a provision, for- "bidding loans on such security, is not inconsistent with the "power conferred in the articles of association, as was held by "the Supreme Court of Ohio in the case of *Conant et al. vs. Seneca "Co. Bank, 1 Ohio St. R. 298*, to which particular reference is "made, as showing the reasons upon which the conclusions rest. "*In re Bigelow, 1 B. R. 203; Ex parte Plant, 4 Dea. & Chitt. R., "160.* Congress undoubtedly intended in repealing the provi- "sion in section 36 of the former act, that no shareholder in any "association under the act should have power to sell or transfer "any shares held by him, in his own right, so long as he should, "either as principal debtor, surety, or otherwise, be liable to the "associations for any debt which should have become due, and "remained unpaid, etc., to relieve the holders of bank shares "from the restrictions imposed by that section, *and in a case "where the articles of association did not contain any provision "authorizing the directors to adopt a by-law providing for such re- "straint in the sale and transfer of shares*, the Supreme Court held, "that loans made by national banks do not give a lien to the "bank on the stock of such stockholders, *but the articles of assso- "ciation in the case at bar do confer that authority upon the direct- "ors, and the directors having exercised that power under the au- "thority conferred in the articles of association, and adopted the by- "law in question, the same is clearly valid, and furnishes a complete "justification to the defendants for their refusal to record the transfer "of the stock, as demanded by the plaintiff. (Bank vs. Lanier, 11 "Wall., 374)."

"Prior to the appeal of the Antecedent Act the directors in "that case had adopted a by-law providing for such a restraint "in the sale and transfer of the stock owned by a delinquent

"stockholder; but the Supreme Court held that the repeal of "the prior act, inasmuch as it removed the restriction, left the "by-law without any foundation, and the by-law, which pro- "vided for the same restriction, also fell with the repeal of the "act on which it rested.

"Well founded doubt as to the correctness of that decision "cannot be entertained, as the by-law was adopted under the "act of Congress, which was repealed, and not under the articles "of association, which did not confer any power upon the direc- "tors to adopt any such restriction. But the facts in the case "at bar are entirely different, as the articles of association in this "case expressly provide that by-laws may be adopted which "shall 'prohibit, if the directors shall so determine, the transfer "'of stock owned by any stockholder who may be liable to the "'association, either as principal debtor or otherwise, without "'the consent of the board.' Opposed to this conclusion, it may "be suggested that the shares of a stockholder are evidenced by "certificates; that such certificates are sometimes used as collat- "erals, and that they are bought and sold in the market, and "that a person purchasing without due inquiry may suffer loss. "But if that suggestion is made there are two answers to it, "either of which is decisive.

"That such certificates are not negotiable instruments. Such "a certificate does not partake of the character of a negotiable "instrument; and the *bona fide* assignee of the same, with power "to transfer the stock, takes the certificates as a contract, sub- "ject only to the equities which existed against his assignor. "*Mechanics Bank vs. Railroad, 3 Kern, 623; Bank vs. Lanier, 11* "*Wall, 377; Bank of Georgetown vs. Laird, 2 Wheat, 393; Steb-* "*bins vs. Ins. Co., 3 Paige, Ch. 350.*

"That a purchaser cannot acquire any greater rights than "his grantor possessed, as all persons dealing in the stock of a "bank are bound to take notice of the charter, or articles of "association, which is a proposition too generally admitted to "require argument in its support."

The Maine Supreme Court has very succintly stated the law on this subject in a much more recent case between the *Bath Savings Institution* and a *National Bank, 89 Me., 500.* The ques-

tion there involved was whether or not a party was entitled to the liquidation dividends of a bank that was being wound up. The Court thus succintly states the law and the result of the decisions upon this subject (*p. 504*):

"'The negotiability or transferable quality of the stock of a "'national bank depends upon the laws of the United States,' "and is not governed by state laws. *Continental National Bank "vs. Eliot, 7 Fed. Rep., 370; Dickenson vs. Central National Bank, "129 Mass., 279; Merchants Bank vs. State Bank, 10 Wall, 604; "Central National Bank vs. Williston, 138 Mass., 248.*

"A national bank may, by law, subject the shares of a stock-"holder to a lien for his indebtedness to the bank, and the "assignee of such shares cannot procure a transfer of the same "upon the books of the bank, until such indebtedness shall "have been paid. *Knight vs. The Old National Bank, 3 Cliff, "429; Union Bank vs. Laird, 2 Wheaton, 390.*

"The assignee of shares with power to transfer the same, takes "an absolute title to the shares subject to any lien created by "the articles of association or by-laws thereunder, and on present-"ment of his certificates many require new ones to be issued to "him as against subsequent assignees or attaching creditors. "*Bank vs. Lanier, 11 Wall, 369; Moores vs. Bank, 111 U. S., 163-"166; Dickinson vs. Bank, supra; Sibley vs. Quinsigamond Nat. "Bank, 133 Mass., 515.* Upon this subject, *Bank vs. Eliot, supra,* "is very instructive, and collates and compares many author-"ities upon the subject. (See also *Johnston vs. Laflin, 103 U. S., "800.*)

"The doctrine of the cases is, *where there is no provision in the "law of the bank, as in this case, to subject shares to the payment of "any debt of the shareholder to the Bank,* that the transferee of "shares that are made transferable only on the books of the bank "by the shareholder or his attorney, and a surrender of the cer-"tificate, as here, takes a perfect title to the shares," &c.

(*b*) *Notice.*

The key-note of this case is found in the articles of association, the by-law of the bank, and above all, the certificate of stock, which calls attention to these very things and prevents any

person from buying a share of stock without taking it subject to any demands or any equities against the holder thereof. Where banks have been defeated in litigations of this character, the cases show clearly that the assignees of the the stock have been parties, and have acquired the stock for value, in good faith, *without notice* of any claims of a bank, or any equities of a bank as against the holder thereof. Such cases have been cases where the stock itself failed to give any notice whatever of the claims or demands of the bank as against the holder of the stock sold and directed to be transferred. Such cases have been cases, therefore, of a secret demand or lien of which the purchaser had no notice. The equity of such a purchaser as against the vendor or the bank, is apparent.

But here, the stock itself giving notice of the demands of the bank thereon, and there being no finding of fact, as there could be no finding of fact, that the Insurance Company did not know of the demands of the Bank against Levi, and of its legal and equitable claims against him and his stock, it is apparent the equities are with the Bank and against the Insurance Company. Such considerations are controlling considerations with the courts in cases of this character.

It is apparent that any party taking an assignment of Levi's stock, by way of purchase or by way of security, took simply those rights which he possessed thereunder, and took with notice of any demands of the Bank thereon because of any loans it had previously made to Levi. The very object of putting the notice in the stock, and thus calling attention to the articles of association and the by-laws, was to protect purchasers or incumbrancers from being misled by Levi because he retained possession of the certificates of stock. In this way, the Bank put itself in a position where it would not be asserting a secret lien or demand against the stock, but where it would be asserting a claim thereon of which it had given notice in advance, and as to which any purchaser or incumbrancer being thus put on inquiry, was bound to know the truth. The fact that from December 3, 1890, when the first loan was made by the Insurance Company, to June 30, 1896, when the Insurance Company in form sold this collateral to itself, the Insurance Company did not seek an

assignment of this stock on the books of the Bank, or demand dividends thereon, is very significant evidence as to the real rights of the parties to this litigation.

The reason why the Insurance Company should not be permitted to get an advantage over the Bank that Levi or his estate could not have obtained June 30, 1896, under such circumstances, is well stated by Mr. Greenleaf in his classical work on "Evidence."

The clause in the stock in question is to be deemed as effective as a recital in a deed, and "as conclusive evidence * * * * against the parties and all others claiming under them *in privity of estate.*"

1 Greenleaf on Evidence, Section 23, and authorities cited in late editions.

This language is used by Mr. Greenleaf with reference to recitals in deeds, but surely the notice contained in this stock is not less effective than it would be if the stock recited the facts that the Insurance Company was notified to inquire about, and would have learned had it made such inquiry.

The theory of this rule of privity is, that when a man sells or mortgages lands or personal property, he tells the truth concerning its status. Therefore, the law deems the purchaser or the incumbrancer privy in estate with the vendor or mortgagor. If he would not be bound because of such privy in estate, the party seeking to evade the obligations of his vendor or mortgagor is bound to show good faith, and that he bought, or loaned money, without notice that it would put him on inquiry as to the facts, or without notice of the facts.

As to negotiable paper, if the paper be sold before its maturity, the presumption is that the purchaser is a purchaser in due course of business, and the burden is upon the other party to show otherwise; but as to choses in action and all other classes of property, the presumption is that the purchaser or incumbrancer knows all that his vendor or mortgagor knew, and such purchaser or incumbrancer must show the contrary, and the absence of any notice putting him on inquiry, if he would escape those rules of law, or those rules of equity, that apply as between his vendor or mortgagor and the person or corporation whose

rights may be impaired by a sale or mortgage to a person in good faith, without notice putting him on inquiry as to the truth.

There was a long struggle to save creditors who proceed in court by attachment, execution or otherwise, from the operation of rules of law or equity compelling them to take only such rights as the debtor had, upon the ground that it was unjust to such creditors to make them assume the charges or liens of the debtor of which they had no notice, but the courts persistently held that a creditor could not escape the rule of law that makes a purchaser or incumbrancer of a chose in action take only those rights of the vendor. The courts refuse to put an attaching or an execution creditor in the same position occupied by a creditor or purchaser without notice.

This appears from the careful opinion of Lowell, C. J., in *Continental Nat. Bk. vs. Eliot Nat. Bk., 7 Fed. Rep., 371*, where he says:

"It is a general rule that creditors, whether they proceed by "an attachment on *mesne process*, seizure on execution, creditor's "bill, or through an assignee in bankruptcy, must take their "debtor's property subject to all *equitable* as well as legal charges, "liens, or opposing titles."

And the learned Judge cites English and American authorities to show that this is a very old and a very well settled rule. Certainly, this being the rule of law, a party like the Insurance Company, which takes with notice of the very claims which the Bank is now asserting, cannot claim to be in any better position than such creditors.

So, too, in a case in this court where a party loaned money to another upon a certificate of bank stock, in good faith, because of false representations with respect thereto, the court, nevertheless, held that the by-law of the bank and the certificate of stock in the bank were in such form as to put such party on notice of the demands of the bank, *which were precisely of the same character as those of the Bank here*, and, therefore, that such party had no remedy against the bank there.

Moores vs. Bank, 111 U. S., 156.

The facts in that case, and the very well considered opinion of Gray, J., are such as to be controlling here upon this point. The by-law of the bank there contained this language:

"No transfer of the stock of this association shall be made, "without the consent of the board of directors, by any stock-"holder who shall be liable to the association, either as principal "debtor or otherwise; and certificates of stock shall contain "upon them notice of this provision." (*P. 157.*)

The certificate of stock there involved was made out directly to the party making the loan, and the only language it contained giving any notice of any claims or demands of the bank, was this language (*p. 158*):

"Transferable only on the books of the bank, in person or by "attorney, on the surrender of this certificate."

From this language, it will be seen that the notice there given was quite ambiguous and indistinct, as compared with the distinct and clear notice here given of the rights or claims the Bank had or might have against the stock of Levi.

The Court there said (*pp. 164–165*):

"The certificate which he delivered to the plaintiff was not in "his name, but in hers, stating that she was entitled to so much "stock, and showed, upon its face, that no certificate could be "lawfully issued without the surrender of a former certificate "and a transfer thereof upon the books of the bank. The by-"laws, passed under the authority expressly conferred by the act "of Congress under which the bank was organized, contained a "corresponding provision, designed for the security of the bank "as well as of persons taking legal transfers of stock without "notice of any prior equitable title therein. *Union Bank vs. "Laird, 2 Wheat., 390; Black vs. Zacharie, 3 How. 483, 513.* "The very form of the certificate was such as to put her upon her "guard. She was not applying to the bank to take stock, as an "original subscriber or otherwise; but she was bargaining with "Robert B. Moores for stock which she supposed him to hold as "his own. She knew that she had not held or surrendered any "certificate, and she never asked to see his certificate or a transfer

"thereof to her; and he in fact made no surrender to the bank "or transfer on its books. She relied on his personal representa- "tion, as the party with whom she was dealing, that he had "such stock; and she trusted him as her agent to see the proper "transfer thereof made on the books of the bank. Having dis- "tinct notice that the surrender and transfer of a former certifi- "cate were prerequisites to the lawful issue of a new one, and "having accepted a certificate that she owned stock, without "taking any steps to assure herself that the legal prerequisites to "the validity of her certificate, which were to be fulfilled by the "former owner and not by the bank, had been complied with, "she does not, as against the bank, stand in the position of one "who receives a certificate of stock from the proper officers with- "out notice of any facts imparing its validity.

"Of the great number of cases referred to in the thorough and "elaborate arguments at the bar, we shall notice only some of "the most important. None of those cited by the learned coun- "sel for the plaintiff affirm a broader proposition than this: A "certificate of stock in a corporation, under the corporate seal, "and signed by the officers authorized to issue certificates, estops "the corporation to deny its validity, as against one who takes it "for value *and with no knowledge or notice of any fact tending to "show that it has been irregularly issued.*"

Here follows a very thorough examination of the cases, English, national and state, including those of New York State, to show that the learned Judge was abundantly supported by the decided cases in his statement of the law.

I will not take the time and paper to go into further authorities on this point, because if it is not established by such deliberately adjudicated cases in this court, based upon numerous cases elsewhere adjudicated, I would probably waste my time in an effort to establish it now for the first time.

(c) *Equitable Lien.*

I have already called attention to the language of *Lowell, C. J., in Cont. Nat. Bk. vs. Eliot Nat. Bk., 7 Fed. Rep., 371,* which shows that an equitable lien is one that will remain against an execution

creditor, and is, therefore, one, I contend, that continues as against a creditor like the Insurance Company, which takes charged with notice of the existing rights of the Bank.

It will be noted that the Bank's claim is not rested upon its claim of an equitable lien alone. The position of the Bank is that if the articles of association, the by-law of the Bank, and the certificate of stock, did not give it a legal and equitable right to insist that its demand be paid before the stock should be transferred to the Insurance Company by Levi, then the arrangement entered into with Levi when his loan was extended, and a further loan was made to him, gave it a right to an equitable lien upon his stock. Had Levi refused to bring in the stock on demand, the Bank could have brought an action in equity to establish a lien thereon, and have such stock sold to satisfy its demands, because of the agreement of Levi with the Bank.

This was the situation and long had been the situation when Levi obtained his first loan from the Insurance Company December 3d, 1890. Possession of the stock certificates was not necessary that the Bank might have such an equitable lien. The stock certificates are not the stock, but are only evidence of the stockholder's right to the stock and any dividends or distribution of property to which he might be entitled as a stockholder.

The Bank therefore, came squarely within the discription of equitable liens which we find in authorities of the highest character. Mr. Pomeroy says:

"It is simply a right of a special nature over the thing, which "constitutes a charge or encumbrance upon the thing, so that the "very thing itself may be proceeded against in an equitable "action, and either sold or sequestered under a judicial decree, "and its proceeds in the one case, or its rents and profits in the "other, applied upon the demand of the creditor in whose favor "the lien exists. It is the very essence of this condition that, "while the lien continues, the possession of the thing remains "with the debtor or the person who holds the proprietary interest "subject to the encumbrance. The equitable lien differs es- "sentially from the common law lien, which is simply a right to "retain possession of the chattel until some debt or demand due "to the person thus retaining is satisfied; and possession is such

"an inseparable element, that if it be voluntarily surrendered by "the creditor, the lien is at once extinguished."

3 Pomeroy's Equity Jurisprudence, Sec. 1233.
See also Sec. 1234, and 1 Pomeroy's Equity Ju., Secs. 165 to 172.

(*d*) *The National Banking Act Does Not Forbid the Transaction in Question.*

In answer to the claim of the Third National Bank, it is suggested that the statute forbids the arrangement made between Levi and the Bank when he got an extension of time upon one loan and an additional loan. But the statute does not forbid a bank from taking an equitable lien on stock of a stockholder, if the stock certificates of the bank are in such form as to charge a party with notice of any demands the bank may have against the stock. *The statute expressly permits a bank to take title to or security upon its own stock, and that means either a legal or equitable lien thereon, if "such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."*

U. S. R. S., Section 5201.

The Court below evidently lost sight of this important provision of the statute, or its application to the facts of this case.

This being the provision of the statute, the Third National Bank had the legal right to put its stock certificate in the form it did. Had the Insurance Company inquired of the Bank before making its loan, or brought its certificates of stock to the Bank to be transferred on the books of the Bank, before making its loan, the Insurance Company could not have been harmed or injured in any way, shape or manner.

The statute, the articles of association, the by-law, and the stock certificate alike provide that this stock was only transferable to the Insurance Company upon the books of the Bank, with consent of the directors of the Bank, at a time when Levi was not indebted to the Bank.

This being so, good faith on the part of the Insurance Company, and ordinary business judgment, required that the Insurance Company bring the certificates of stock to the Bank and

request the Bank to transfer such stock upon its books before the Insurance Company should make any loan whatever to Levi thereon. Had the Insurance Company done this, and had the Bank refused to make the transfer, the Insurance Company would not have been harmed. The Insurance Company, or Levi, could have brought an action to compel such transfer, and in such an action it cannot be doubted that the Bank would have prevailed until Levi or the Insurance Company should tender the Bank the amount of its loan. He who seeks equity must do equity, and had the Insurance Company or Levi sought to compel a transfer of this stock on the books of the Bank before the Bank's loan was paid, a Court of Equity would not have compelled such transfer until the Bank's equitable lien thereon was satisfied.

Under the practice prevailing in the State of New York, the Bank's equitable demand is a perfect defense to any suit brought by the Insurance Company to compel the transfer of this stock on the books of the Bank. And this Court will not lose sight of the fact that in the case of *Knight vs. Old National Bank, 3 Cliff., 429*, the same thing was held, after careful consideration of this subject. Indeed, that case goes further and holds that under the Act of Congress, as amended in 1864, a certificate of stock that gives notice of the rights of a bank, entitles the bank to refuse a transfer of its stock until the holder of such certificate has paid the demands of the bank against him.

We contend that the statutes and the authorities abundantly sustain this position.

(*e*) *The Certificates of Stock giving notice of the Bank's rights, the Insurance Company cannot ignore them, even if the regulations of the National Banking Act were violated in making the by-law and issuing stock certificates in this form.*

This is so because the National Banking Act does not enable the Insurance Company to take an advantage that its assignor, Levi, could not have taken because the Bank may have violated some provision of the National Banking Act.

A great English chancellor long since stated the true reason for the rule of law on this subject:

"In the case of *Le Neve vs. Le Neve, (3 Atk., 646)*, Lord Hard-
"wicke said, 'It would be a most mischievous thing, if a person
"'taking advantage of the legal form appointed by an act of
"'Parliament, might, under that, protect himself against a per-
"'son who had a prior equity, of which *he had notice.*'"

Quoted and approved in Dunham vs. Dey, 15 Johns., 555, op. 570.

This principle has met the approval of this court in construing the National Banking Act. That Act expressly forbids loans upon securities on real property. Nevertheless, when such loans have been involved, the state courts have been reversed where they have held, as the Court of Appeals in New York did in *Crocker vs. Whitney, 71 N. Y., 161*, that such mortgages were void and unenforceable.

In like manner, a national bank is forbidden to certify a check which does not represent a deposit. Nevertheless, where this regulation is violated, the check is not thereby rendered void. Thus we see that neither the customer of the bank nor the bank itself is permitted to take advantage of a violation of the statute, when the statute does not expressly make a check, mortgage, or security, void because the statute has been violated.

The rule of law on this subject is thus tersely stated in *Thompson vs. St. Nicholas Bank, 146 U. S., 251:*

"Moreover, it has been held repeatedly by this court that
"where the provisions of the national banking act prohibit cer-
"tain acts by banks or their officers, without imposing any
"penalty or forfeiture applicable to particular transactions which
"have been executed, *their validity can be questioned only by the*
"*United States and not by private parties. National Bank vs.*
"*Matthews, 98 U. S., 621; National Bank vs. Whitney, 103 U. S.,*
"*99; National Bank of Xenia vs. Stewart, 107 U. S., 676.*"

II.

The authorities do not hold that the German Insurance Company can compel the Bank to transfer its stock upon its books until its claim against the Levi estate has been paid.

It would be impossible to review all the cases that have been cited to sustain the position of the Insurance Company. We

may only call attention to the governing principle controlling those cases, and call attention to a few of the leading cases. We may note that the cases most favorable to the Insurance Company are the cases in the State of New York. As Clifford, J., showed in his careful opinion in *Knight vs. Old National Bank, 3 Cliff., 429*, some of those cases are not consistent with the adjudicated cases in other states or in the Supreme Court of the United States. It is not necessary, however, that we go into detail on this subject. It will suffice to say that even the cases in the State of New York, and the cases cited for the Insurance Company from the reports of this Court, alike recognize the controlling force and effect of a certificate of stock which gives notice to any purchaser or incumbrancer thereof of the claims of the corporation against the stockholder who seeks to sell or incumber his stock. Not one of these cases holds that the certificate of stock, and the notice it gives, can be ignored, if that certificate of stock is based on a by-law, and the by-law, in turn, has some support in a statute; or in the official act of an official under the statute, like the comptroller who controls the national banks of the United States.

Wherever the certificate of stock fairly gives notice of the rights of the corporation issuing the stock, the party who would purchase such stock, or take it as security, is bound to take notice of the claims of the corporation upon it. Being bound to take notice thereof, the purchaser or encumbrancer with notice simply steps into the shoes of the vendor, pledgor, or mortgagor.

An examination of numerous cases to which we shall not refer, will disclose almost universally the stress laid by the courts upon two facts: 1. Was the by-law declaring the stock could not be transferred until the stockholder paid the corporation, one of which the certificate of stock gave notice to the purchaser or encumbrancer, or was the claim asserted in the nature of a secret lien, of which the purchaser or encumbrancer would receive no notice from the certificate of stock itself? 2. And of the same nature is the stress laid upon whether or not the purchaser, pledgor, or other encumbrancer, is shown to have been a *bona fide* purchaser or encumbrancer without notice of the rights asserted by the corporation as to such stock, if the stockholder holding it was indebted to the corporation.

For instance, in *Driscoll vs. Mfg. Co., 59 N. Y., 96*, in the statement of facts we read:

"Neither the plaintiff nor Bartlett had actual notice of Brad-
"ley's alleged indebtedness, nor of the by-law last above-
"mentioned, when they acquired the stock." (*P. 98*).

In the careful opinion of Folger, J., he says (*p. 101*):

"No limitation nor restriction of this ownership nor of this
"power of transfer, was declared or suggested in the certificate."

Of shares of stock, the learned Judge later says (*p. 105*):

"The right to them is a chose in action, and though not trans-
"ferable, so as to give the same safety in dealing, as is given to
"a *bona fide* taker of negotiable paper, the current of authority
"*in this State* is to the protection of the *bona fide vendee*, against
"*secret* or equitable claims thereto of one who has indued the
"vendor with *indicia* of ownership. * * * *

"Now we do not assert that it is not possible to legally abridge
"this right. There may be power given by statute so to do.
"There may be, in some cases, an agreement of the original
"stockholders, among themselves, by their articles of association,
"that such power shall exist. The latter, as we have seen, does
"not appear in this case."

But it does appear in the case at bar.

Again the Court says, after reviewing many authorities, showing how numerous are the cases, that an assignee only takes the rights of his assignor:

"But no authority is cited for the further position that a *bona*
"*fide* purchaser of stock, without knowledge *or notice of* such
"usage or *regulation derived from the contents of the certificate*, or
"otherwise, is bound thereby." (*P. 109*).

The Appellate Division did not find such authorities inconsistent with our position in this case. Adams, J., in a very carefully considered opinion, considering the case last quoted, and like cases in the United States Supreme Court, and also cases in New York and Massachusetts Courts, thus stated the reason why the Court thought the case at bar was not controlled by such authorities:

"But in this instance, as we have seen, the certificates were "not in the usual form, for they contained what was equivalent "to an announcement to the whole world that the stock which "they represented was subject to a possible lien in favor of the "corporation issuing the same, and that such stock would not be "transferred upon the books of the corporation until that lien was "satisfied. Consequently, when the certificates in question came "into the plaintiff's possession, it was with full notice of the "defendant's rights, whatever they might be and, therefore, the "plaintiff took the same subject to whatever equities existed "against the title of the pledgor.

Buf. German Ins. Co., vs. Third Nat. Bank, opinion 29, App. Div., pp. 141, 142.

Upon the first appeal the Court of Appeals reached a different conclusion, *in 162 N. Y., 163*, and that decision is the one which was followed by all the Courts in the decision now here for review. The ground of the decision of the Court of Appeals may be found in two sentences, which I quote:—

"I should say that there was a marked difference between any "such claim of the Bank, which slights a provision of the Bank-"ing Law, intended to negative the right to a lien and to confer "the valuable character of transferability upon national bank "shares, in the public interests, and a claim which a borrower, "or his representative, asserts against the right of a national "bank, as his creditor, to realize its debt upon securities which "have been held by it in pledge, *though not within the class of "those it was authorized to hold.* * * * How can it "reserve to itself a right to a lien upon shares of its own stock, "in contravention of the provisions of the National Banking "Act, and become entitled to demand of the Courts to enforce it "as against a purchaser of the shares, whose title thereto is acquired *bona fide* and for value?

(*Opinion 162 N. Y., 171, 177; record, pp. 24, 28.*)

It will be observed from these quotations that the Court below really rests its decision upon two propositions: 1—the National Banking Law prohibits the making of the by-law, the certificate, and the loan to Levi, as stated; 2—that the plaintiff is to be

treated as a *bona fide* purchaser or encumbrancer of the Levi stock.

An examination of the opinion will show that these two propositions are rested upon the decisions in *Bank vs. Lanier, 11 Wall., 369, and Bullard vs. Bank, 18 Wall., 594*, and the cases, state and national, which have followed and applied those cases.

Without going into the cases in other Courts that have followed or applied those cases, is there anything in *Bank vs. Lanier*, or *Bullard vs. Bank*, going to any such length as it is necessary to go to determine this case in favor of the Insurance Company and against the Bank?

Bank vs Lanier was a case of purchase. The character of the certificates of stock there involved is not disclosed. The Court there says:

"If we assume that the certificates in question are not different "from those in general use by corporations—and the assumption "is a safe one—it is easy to see why investments of this character "are sought after and relied upon." (*P. 377.*)

Of the purchasers the Court said:

"*They bought for value, without knowledge of any adveree claim, "in full faith that the bank would observe its engagements, and pur-"sued in all respects the directions given in the certificates.*" (*Opinion, p. 378.*)

Here, then, we have a clear case of a *bona fide* purchase for value, without notice, where the Court assumed that the certificate was absolutely silent as to any claim the bank could possibly have thereon as against the holder thereof. It appears, according to the case, that there was nothing there to give the purchaser notice of any by-law attempting to prevent the transfer of such stock if the holder thereof was indebted to the bank. That case, therefore, is no authority for the German Insurance Company here.

In *Bullard vs. Bank*, Bullard claimed the stock as part of the assets of the bankrupt, and demanded that the bank transfer the stock to him. There, again, the case is silent from beginning to end concerning anything in the certificate of stock giving notice that the stock could not be transferred while the holder was

indebted to the bank. There the bank undertook to maintain its position solely by virtue of the by-law, without any provision in the certificate of stock, or articles of association, apparently, upon which to rest such by-law. Justice Clifford dissented from the opinion in the case, because he thought the opinion in *Knight vs. Bank*, from which we have heretofore quoted, correctly stated the law. Justice Strong did not refer to the opinion in the *Knight Case*, but rested the decision in the *Bullard Case* squarely upon the decision of *Bank vs. Lanier*. There is, therefore, nothing in the *Bullard Case* that brought up for decision the question of whether or not, if the certificate of stock is in the form of that here presented, and the transaction took the form of the transaction with Levi, Levi's assignee of such certificate of stock would stand in his shoes.

Our position is that Levi's assignee is in the same position that a man is in who purchases a farm subject to a bond and mortgage that is usurious. The owner of the farm might successfully resist such bond and mortgage, but the purchaser of the farm cannot. He is in the same position as a man who leases a piece of real estate. Such man cannot question the title of his lessor, although another person might successfully question such title. So, here, the Insurance Company is privy in estate with Levi, and because Levi could not question the rights of the Bank, the Insurance Company, as his assignee, that has received notice of the Bank's rights through the certificate of stock, is in the same position in which Levi was placed.

(*a*) *Executed Transactions.*

It is suggested that the rule laid down by this Court in the case of mortgages of real estate to a national bank, despite the National Banking Act, does not apply to a case of this character, because there is a broad distinction between executed contracts and executory contracts.

There is a broad distinction between executed contracts and executory concracts. The Court of Appeals, however, did not show its usual learning in its observations on this subject. When a national bank is foreclosing a mortgage, it is foreclosing that mortgage because that mortgage is an *executory contract*. A

national bank would not have to come into a court of equity to foreclose its mortgage, to enforce its rights, if the mortgage was an executed contract and not an executory contract. For this reason our Court of Appeals once thought that a court of equity was bound to refuse its aid to a national bank in a foreclosure, because to aid a bank in a foreclosure would be to aid it to violate the Act of Congress, and render that Act a nullity. But this Court corrected that erroneous impression, as we have shown, by pointing out to the Court of Appeals that the borrower could not be permitted to take advantage of such a plea, since it had reference to a regulation of the bank by the Government, which regulation the Government alone is to enforce.

So here, all the provisions of the National Banking Act about loaning money upon the stock of the Bank, are regulations of National Banks by the Government. If the Bank disregards those regulations, the borrower of its money should not be permitted to take advantage of them, for the reasons given by Chancellor Hardwicke.

Upon what theory, then, can it be said that the Bank can enforce its mortgage in a Court of Equity, but cannot ask a Court of Equity to protect it in a suit of this character?

If the Bank can enforce its mortgage, why may it not insist that a party obtaining its certificates of stock, with notice of its claims, cannot have those certificates transferred on its books until its claims have been satisfied? Had the party who obtained those certificates brought them to the Bank for transfer on its books before loaning money upon them, as good faith and good law alike would require, no possible harm could have come to that party, or to the Bank.

We thus see that the Insurance Company is compelled to bring this action against the Bank to have it transfer the stock upon its books, because the transfer by Levi to the Insurance Company is not a completed transfer, and the contract is still executory and not an executed contract. But the Bank has loaned the money to Levi, and its contract of loan has been executed and is no longer executory. Consequently, if there really was anything in this principle applicable to this case, the Bank may very well insist that, having loaned its money in good faith to a stockholder

and creditor, and extended the time of payment for him, because of the security agreed to be furnished by the stockholder, that stockholder's assignee should not be permitted to force the Bank to transfer that stock on its books, when the debtor of the Bank would not be permitted to force such a transfer.

The very bringing of this action shows that the Insurance Company is dealing with an executory and not with an executed contract, and consequently the principle invoked below has no application to this case.

(*b*) *Public Policy.*

It is suggested that public policy requires that this Court decide that the Insurance Company is entitled to have the stock transferred on the books of the Bank, because otherwise banks will ruthlessly violate provisions of the National Banking Act.

This suggestion is quite as applicable to the cases of real estate mortgages, and cases of certifying checks where deposits have not been made, as it is to cases of this character. Indeed, there are comparatively few stockholders in such banks, and comparatively few transfers of bank stock that will become involved, as compared with the number of cases that arise because checks are certified where deposits are not made, or mortgages are taken contrary to the provisions of the National Banking Act.

Moreover, there is no principle of public policy that requires this Court to decide this case in favor of the German Insurance Company as against the Bank. Suppose this Court determines that where the certificate of the Bank stock is in such form as to give notice of the Bank's claim, a party taking the same as security, *without having the same transferred upon the books of the Bank, in accordance with its by-laws*, and holding it for years as such security, without giving notice thereof, or demanding dividends thereon, is not entitled to force the Bank to transfer such stock upon its books until the Bank has been paid its demands against the holder thereof, in accordance with his agreement with the Bank concerning the stock, will the law, or any principle of justice, receive any severe wrench?

Where is any principle of public policy involved in holding that there is a broad distinction between cases of by-laws of cor-

porations undertaking to assert a secret lien upon the stock of the corporation as against *bona fide* purchasers or encumbrancers thereof, and cases holding that if the stock of a corporation gives notice of the rights claimed by the corporation thereon, the party taking such stock merely steps into the shoes of the holder thereof, and holds it subject to the same claims that rested upon it at the time of the attempted transfer?

The Bank being prior in right, and having parted with its money in good faith, under the very provisions of the section of the National Banking Act which we have quoted, why should the Court refuse to protect the Bank in its rights, or why should the Court compel a transfer of stock on the books of the Bank, when thereby it will give greater rights to the Insurance Company than Levi had or could transfer to it? In the absence of any finding that the Insurance Company is a *bona fide* holder of such stock, and in a case where the certificate of stock shows it had notice of the claims made by the Bank thereon, why should the Bank be compelled to pay the Insurance Company upwards of $12,000 of dividends and interest, that are otherwise applicable to the payment of the demands of the Bank against Levi?

As the Insurance Company is sure of the stock in any event, why should the Bank not be permitted to retain dividends enough to pay it, in exact accordance with the agreement of Levi, and with the understanding evidenced by the certificate of stock itself?

Why should this Court not apply this same principle of justice and fair dealing that it applied in the *Whitney Case*, when it reversed that case, as reported in *71 N. Y., 161*, and enabled the Bank to foreclose its mortgage, as it did in *103 U. S., 99*.

III.

It follows that the judgment of the Supreme Court of the State of New York, and of the Court of Appeals of the State of New York, should be reversed, and this case should

be remanded to those courts, with directions to enter a decree accordingly.

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PRESS OF "THE BUFFALO COMMERCIAL."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y., PLAINTIFF IN ERROR,

vs

THE BUFFALO GERMAN INSURANCE COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE BUFFALO GERMAN INSURANCE COMPANY, THE DEFENDANT IN ERROR.

HISTORY OF THE CASE.

This case has been twice tried, and has been twice to the Appellate Division of the Supreme Court and twice to the Court of Appeals of the State of New York. The first trial resulted in a judgment for plaintiff in error on the authority of the case of *National Bank vs. Whitney*, 103 U. S. 99. When first before the Appellate Division (29 Appellate Division, 137) Mr. Justice ADAMS wrote the prevailing opinion (Justices HARDIN and FOLLETT dissenting) and in that opinion he seemed to reach the conclusion that the defendant's in error claim was correct, but that the decision in *Bank vs. Whitney*, 103 U. S., 99 was controlling.

The Court of Appeals took a different view of the matter and

(in 162 N. Y., p. 168), Justice GRAY writing the opinion, unanimously reversed the judgment of the Appellate Division, making the distinction claimed by counsel for defendant in error between a security actually taken, though in violation of law and the creating of a forbidden constructive or equitable lien where no security was actually taken. In other words, holding that the Bullard class of cases, in the brief and opinion referred to, did not conflict with the Whitney class of cases.

Under the decision of the Court of Appeals reversing the trial Court the case went back for a new trial at the Erie Equity Term of the Supreme Court of the State of New York, Mr. Justice LAMBERT presiding, October 16, 1900, and resulted in a judgment for the defendant in error. The defendant Bank appealed from that judgment to the Appellate Division of the Supreme Court which affirmed the judgment, and from that judgment the defendant Bank appealed to the Court of Appeals of the State of New York, which latter Court affirmed the judgment in favor of the defendant in error (171 N. Y., 670) on the opinion in its former decision in favor of defendant in error reported in 162 N. Y., 163.

There was no change in the facts presented on the two appeals to the Court of Appeals except that the Bank eliminated the flimsy evidence upon which it based its claim for a verbal pledge of the stock without delivery and obtained a finding (Finding 15). That October 1, 1890, Emanuel Levi applied for a further loan of $12,000 (from Bank) and proposed to secure the same by note made by himself and endorsed by his son Louis Levi, and to treat and consider as delivered to the Bank the stock which he owned in that corporation and which was then in the safe deposit vaults of the Buffalo Loan & Trust Co., as security for the payment of its indebtedness and the loan that day made. The evidence showed, and the fact being, that Levi alone had control of the property in the Safe Deposit Company.

The only other changes in the findings were the insertion of the 13th, 14th, 16th, 17th and 18th findings, which on the former trial and appeals were shown by the undisputed evidence. There has been no change in the findings more favorable to the Bank.

The case was therefore the same case as was decided by the Court of Appeals on the former appeal. Mr. Justice LAMBERT so held and decided the case without writing any opinion. The Appellate Division so held in affirming that judgment without opinion. (61 Appellate Division, 612.)

On the first appeal all of the evidence was taken to the Court of Appeals on a case containing exceptions; on the second appeal the Bank appealed on a Bill of Exceptions alone, leaving out the evidence, presumably because it weakened its flimsy claim of a verbal pledge of the stock without delivery upon which the finding of fact XV is founded (Fol. 23.)

The defendant Bank, Plaintiff in Error herein, sued out the writ of error to review the judgment entered on the decision of the Court of Appeals.

FACTS.

This action was brought by the defendant in error to compel the plaintiff in error to transfer to such defendant on the books of such plaintiff four hundred and fifty shares of its capital stock, of which the defendant in error claims to be the owner by purchase, as hereinafter set forth.

The shares of stock were originally issued to Emanuel Levi and were evidenced by certificates numbered B—58, B—59, B—60, B—61 and B—62, aggregating four hundred and fifty shares of the par value of $45,000 upon which he borrowed of defendant in error as hereinafter set forth $55,000, pledging and delivering to it all of said certificates of stock.

The plaintiff in error is a National Banking Corporation, organized under the Act of Congress of 1864, its certificate of organization being filed February 14, 1865. Its said certificate of stock were all in the following form:

"Number———— Shares——

STATE OF NEW YORK,
THIRD NATIONAL BANK
OF BUFFALO.

This is to Certify that Emanuel Levi is the owner of shares of One hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien

or liens referred to in section fifteen of the by-laws of said bank in the following words:

'No transfer of the stock of this association shall be made without the consent of the Board of Directors, by any stockholder, who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.'

And that the said stock is transferable only upon the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with said by-laws.

Dated, at Buffalo, N. Y., this day 18 .

CHARLES A. SWEET, President

N. ROCHESTER, Cashier."

On the third day of December, 1900, said Emanuel Levi being then the owner of said certificates of stock, borrowed from said Bank the sum of Twenty-five thousand dollars, payable on demand, giving therefor his promissory note, and an assignment of said certificates of stock as follows:

"Know all men by these presents, That I, Emanuel Levi, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto The Buffalo German Insurance Company 250 shares of the capital stock of the Third National Bank of Buffalo, being certificates B—60, B—61, and B—62, standing in my name on the books of the Third National Bank. I do hereby constitute and appoint John P. Diehl Chairman of the Finance Committee of the Buffalo German Insurance Company, my true and lawful attorney, irrevocable for me and in my name and stead, but to use, to sell, assign, transfer and set over all or any part of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that the said attorney, or his substitute or substitutes, shall lawfully do by virtue hereof.

In Witness Whereof, I have hereunto set my hand and seal the third day of December, 1890.

EMANUEL LEVI." [L. s.

And a certain other paper as follows:

"Received, Buffalo, December 3d, 1890, of the Buffalo German Insurance Company of Buffalo, N. Y., Twenty-five thousand dollars under an account opened by me with said company, to be returned on call, with interest at the rate of six per cent. per annum; and as collateral security for the payment thereof I have assigned to said company.

Ctf. B—60 Third National Bank, Buffalo, $10000.
" B—61 " " " " $10000.
" B—62 " " " " $5000.

In case I shall refuse or neglect to pay the said principal and interest on call, I do hereby authorize the said company to sell the said securities at public or private sale on notice of five days by letter mailed to my address at Buffalo, N. Y. And from the proceeds thereof, after deducting all costs and expenses, to satisfy the said principal and interest, rendering the surplus, if any, to the undersigned.

EMANUEL LEVI."

And on said day the said Levi delivered the said note, assignment and receipt, together with the stock so assigned, to the Insurance Company, receiving in return therefor its checks aggregating Twenty five thousand dollars, which checks he afterwards endorsed and received the money thereon.

On August 13, 1891, the said Levi borrowed from the Insurance Company an additional Twenty thousand dollars, giving to it assignment of certificates B—58 and B—59 of the stock of the Bank of the par value of Twenty thousand dollars as security for the payment of his demand note for said sum, and interest, and then delivered to said Company said note, said certificates of stock and the assignment there of, together with a receipt similar to the one above set forth.

On May 25, 1892, the said Levi borrowed from the Insurance Company an additional Ten thousand dollars, giving to it an assignment of all the certificates of stock hereinbefore mentioned as security for the payment of his demand note for said sum and interest, and then delivered to said company said note, an assignment of said stock and another receipt as above set forth, all

the certificates of stock so then assigned being in the possession of the said Insurance Company.

That ever since said stock and the several certificates thereof were delivered to the Insurance Company, they have been in its possession and are now held by it.

That before the commencement of this action, and prior to the demand and notice hereinafter mentioned, the said Emanuel Levi died, and thereafter Rosa Levi and Louis E. Levi were duly appointed his executors, and qualified as such.

Interest on said demand notes was paid to January 1st, 1896, except the sum of Three hundred dollars, leaving due and unpaid on said loans the sum of Fifty-five thousand dollars of principal, said Three hundred dollars interest, and interest from January 1st, 1896.

On June 9th, 1896, the Insurance Company made a demand in writing upon the said executors of the said Emanuel Levi for the payment of said notes, and to redeem the said stock, and gave them notice that in the event of their failure to pay said debt and to redeem said stock on or before the 16th day of June, 1896, the said stock would be sold and the proceeds thereof used to liquidate the said indebtedness. That a copy of the notice and demand so served upon each of said executors was introduced in evidence.

On June 22, 1896, the said debt not having been paid, nor said stocks redeemed, the Insurance Company caused a notice of the sale thereof on the 30th day of June, 1896, at 10 o'clock in the forenoon, to be served upon each of the executors of said Emanuel Levi, and also caused three copies of such notice to be posted in three public places in the City of Buffalo.

On the 30th day of June, 1896, at the time and place mentioned in said notice, the Insurance Company offered the said stock for sale to the highest bidder, the said Bank being then present by its attorney, and said executors being present by their attorney and by Louis E. Levi, in person; other persons were also present. The Bank by its attorney gave notice that it claimed a lien upon the said stock, which notice was introduced in evidence, and also stated that it held stock of the Buffalo German Insurance Company and of the German Bank, aggre-

gating the par value of Two thousand dollars, as further security for part of the amount for which it claimed a lien on said stocks then offered for sale.

The stock was thereupon offered for sale, and finally sold to the Insurance Company for the sum of Forty-four thousand dollars.

Thereafter, on the same day, the Secretary of the Insurance Company and its attorney, took the said certificates of stock, and the proofs of the regularity of the sale, to the said Bank, and demanded of its President and Cashier that the same be transferred on its books to the Insurance Company, exhibiting the certificates and other papers to the President of the Bank, who declined and refused to make the transfer.

Thereafter a subsequent demand for such transfer was made upon the President of the Bank, the certificates and other papers being presented to him at the time of making such demand, but he again refused to make such transfer.

The said Bank claims to have a lien on said stock by virtue of the statements printed in the body of the stock certificate.

The said Bank never exercised the lien which it claimed to have on the said stock and dividends declared thereon, until after the sale of said stock by the Insurance Company, and its demands for the transfer thereof. *It always paid the dividends declared on said stock to Levi or his estate until July* 1, 1896, *after the sale by the Insurance Company.* The dividends for July, 1896 and January, 1897, it claims to have used in reducing Levi's indebtedness to it.

For other indebtedness owed to it by Levi the said Bank took as security the stock of the Buffalo German Insurance Company and of the German Bank hereinbefore mentioned, and on other notes it had the endorsements of J. H. Tilden and Irlbacker & Davis.

The said Bank had and retained possession of the stock of the Insurance Company and of the German Bank, which it took as security for Levi's indebtedness and finally after this action had been commenced, sold the same; but it never had possession of its stock pledged by Levi to the Insurance Company.

The said Bank claimed a lien on Levi's stock for the sum of about Fifteen thousand, four hundred and thirty-nine and 99-100 dollars, and it estimates the market value of the stock of the Insurance Company and of the Bank which it holds as security at Nine thousand dollars, leaving its unsecured debts from Levi the sum of Six thousand, four hundred and thirty-nine and 99-100 dollars.

The said Bank *never had or claimed actual possession of the stock in question.*

The said Bank never exercised any lien upon the stock or its dividends. It paid dividends during all the time covered by this action aggregating more than twenty thousand dollars, and paid those dividends to Mr. Levi up to July, 1896, when the Insurance Company purchased the stock and made demands for the same. (Record p. 15.)

That during all the times covered by the transactions between Levi and the Bank and the Insurance Company Levi was a Director of the Bank.

POINTS.

I

The bank, Plaintiff in Error, had no lien, actual or constructive, on stock of Levi held by the Insurance Company, defendant in error.

(a) The Bank, Plaintiff in Error, had no authority to make a by-law such as purports to be set out in its stock certificates.

(b) The alleged by-law was unauthorized and void, and created no lien on the stock.

II.

The Bank, Plaintiff in Error had no pledge of the stock.

(a) The Bank, Plaintiff in Error, never had possession of any of the certificates of stock after they were issued to Levi.

(b) The Insurance Company, defendant in error, had possession of each certificate from the time it was pledged to it.

III.

The Bank, Plaintiff in Error, waived any lien on stock by failing to enforce it and by paying profits and dividends thereon to Levi.

(a) The Bank, Plaintiff in Error, has declared dividends semi-annually from May, 1889, to July, 1896, at least six per cent. per annum; these dividends amounting to more than twenty thousand dollars were paid to Levi, while it is now claimed by the Bank it had a lien on the stock of Levi; these dividends amounted to more than three times the unsecured claim of the Bank. Such payment was a waiver of any lien the Bank might have had.

IV.

The Bank's Plaintiff's in Error, proof failed to establish a lien.

(a) It failed to prove that Mr. Levi owed the Bank, plaintiff in error, any sum.

(b) It showed that the indebtedness to the Bank, plaintiff in error, was that of Louis Levi and Rosa Levi.

(c) The executors could not bind the estate.

V.

The Court must differentiate between the class of cases represented by the Lanier, Bullard and Conklin cases and those represented by the Whitney case.

All authorities recognize the two classes of cases as existing, but not as antagonistic in principle. In this case the Court is asked, not to enforce a lien, but to create one in favor of the Bank by construction; the other class of cases are to enforce liens or pledges which the banks actually had.

POINT I.

At the outset of the argument we desire to impress upon the Court the difference that exists between an attempt to set aside or have declared void a lien or security which a National Bank has and which has become an executed contract, and an attempt

to create a lien on an implied executory contract or security when the bank *has none,* and where it admits it has none, in face of a law which says it shall not have such a lien or take such security. The counsel for Plaintiff in Error on this appeal does not cite a number of cases which were deemed to be of importance by him on former appeals, but each case cited involving the rights of a bank is a case of an attempt to invoke a forfeiture of vested rights in the bank in favor of *an individual who was a party to the alleged wrong.* And the Courts held that the government was the only party who could act in the premises to punish the offender for failure to obey the law. The *Thompson* case was a case of over certification of a check by a bank officer. The law itself provided that the check should be good as against the bank in the hands of an innocent holder, but provides a punishment for the officer who shall have certified to the over draft. We shall again call attention to the cases cited by the counsel for the plaintiff in error, but we want to fix the attention of the Court on the fact that the claim of the plaintiff in error herein is entirely different from the claim in any of those cases, is not in conflict with them and is not affected by the questions they decide. The effort of the plaintiff in error in this case *is not to enforce a lien; it is to create a lien.* It comes into court by its counsel, admits that it has no lien, but asks the Court to create an equitable lien for it, and that in face of the direct prohibition of the statute made for the good reason that if stock in a bank is to be taken as security for its loans, there must result an impairment of the assets of the bank.

The Bank, plaintiff in error, is not here asking the Court to enforce a security which it has, *but to create one which it has not.* In every case cited by the counsel where the bank had taken security prohibited by law, *it had the possession of the security.* Nobody else had it. The bank was in actual possession of the security it sought to enforce. It had loaned on the strength of that actual security; it had a lien on the security, *not an implied, but an actual lien, including possession,* and in defending against it rights of third parties were not affected, but it was simply a case of trying to invoke a penalty in favor of an individual, when it was solely the province of the government to inflict the penalty if it saw fit so to do.

The defendant in error became the owner of the stock by its proceedings to sell the same after the default in the payment of the sums for which it was pledged. There was no controversy as to the regularity of the sale of the stock on the trial, and we suppose there can be none here. The defendant in error was, therefore, clearly entitled to a transfer of the stock on the books of the Bank.

But the plaintiff in error claimed that the defendant in error was entitled to have such transfer made when, and only when, it should tender or pay to the Bank the amount of its claim against Levi, for which it had a lien on said stock.

The plaintiff in error never had any lien on said stock or any portion thereof, and it has no claim against Levi.

The plaintiff in error is a banking corporation, organized under the Act of Congress for the incorporation of National Banks. It was organized on the 9th day of January, 1865.

The original Act for the incorporation of National Banks, 12th United States Statutes at Large, page 675, Section 36, provides as follows:

"And it be further enacted, That the capital stock of any Association formed under this act shall be divided into shares of one hundred dollars each, and shall be assignable on the books of the association in such manner as its by-laws shall prescribe; but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any sum which shall have become due and remain unpaid, *nor in any case shall such shareholder be entitled to receive any dividend, interest or profit on such shares so long as such liabilities shall continue. And all such dividends, interests, and profits shall be retained by the association and applied to the discharge of such liabilities;* and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association."

The entire Act of 1863 was repealed by Section 62 of the Act of 1864.

See United States Statutes at Large, Vol. 13, p. 118.

This Act of 1864, being Chapter 106 of the first session of the Thirty-eight Congress, is the law under which the Third National Bank was organized. Section 35 of said Act prohibits any association formed under said Act from making loans on security of its own stock. It is as follows:

> "And it be further enacted, that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months —from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association, according to the provisions of this Act."

The same provision is in Section 5201 of the second edition of the Revised Statutes of the United States.

In the Act of 1864, Section 36 of the Act of 1863 was not re-enacted. Its provisions were plainly in conflict with the provisions of 5201 above quoted, and it is plain that the omission was intentional and for the very purpose of making the provisions of 5201 more effective.

Section 15 of the by-laws of the Bank, the plaintiff in error, might have been justified, although not necessary under the Act of 1863, but after the repeal of the Act it was entirely unauthorized. Subdivision 6 of Section 5136 of the Revised Statutes provides that National Banks shall have power to prescribe by its board of directors, by-laws *not inconsistent* with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted and the privileges granted to it by law exercised and enjoyed.

There is no authority in the law for the enactment of a by-law containing the provisions of Section 15 in this Bank's by-laws, and there is, as we have said, an express provision prohibiting any such by-law in the Act of Congress which prohibits the Bank

from loaning on the security of its own stock. The provisions of Section 15 of this Bank's by-laws *are inconsistent with law* and are therefore void.

This question has been fully decided in the United States Supreme Court, first in the case of the Bank vs. Lanier, 11 Wallace, 369-378, and afterwards in Bullard vs. National Eagle Bank, 18 Wallace, 589-598.

Under these decisions it is plain that the language contained in the 15th section of this Bank's by-laws, intending to give the bank a lien upon the stock of its debtor stockholder, is unauthorized and void. They hold that "a National Bank organized under the National Banking Act of 1864, cannot even by provisions framed with a direct view to that effect in its Articles of Association, acquire a lien on its own stock held by persons who are its debtors." The same doctrine is fully set forth in the Second National Bank of Louisville vs. National and State Bank of New York, 10 Bush, (Kentucky) 367-375.

The statement contained in the certificate of stock, of the plaintiff in error, that the indebtedness of the stockholders should be a lien upon the stock, does not affect the right of the Insurance Company, the defendant in error. In the case of Conklin vs. The Second National Bank of Oswego, 45 N. Y., 655, it is held that while a certificate of stock in a National Bank contained a provision that the stock was not transferable until all the liabilities of the stockholders of the bank were paid, that such an agreement gave the bank no lien upon the stock, and was void as prohibited by the Act of Congress of 1864.

13 *United States Statutes, p.* 99.

In this case Justice Grover goes into the argument with great force and clearness, and shows that there is no power to enact such a by-law, and that there is no law authorizing the insertion of such power of the directors in the Articles of Association.

And in the case of Driscoll vs. The West Bradley & C. M. Co., 59 N. Y., 96, Judge Folger, in writing the opinion, shows that in order to make the provisions of the Articles of Association or by-laws of a corporation binding, there must be authority in the act creating the corporation for such by-law.

The decisions above cited show that the Act of 1864 contained no such authority and did contain a specific prohibition against any such action, and as Judge FOLGER says at page 102, "The judgment in this case may be put upon the absence of power in the defendant to make the by-law under which it asserts a lien."

The principle that we contend for was squarely held in Evansville National Bank vs. Metropolitan National Bank, Circuit Court, Indiana, May Term, 1871, reported in 2 Bissell's Reports, page 527. The case is squarely on all fours with the case at bar.

This case was appealed to the Supreme Court, and affirmed.

As it is short, we give it practically in full.

"Appeal from District Court.

This was an action by the Evansville National Bank, of Evansville, Indiana, to recover two hundred shares of its capital stock, pledged to the Metropolitan National Bank of New York City.

The Evansville National Bank was organized in January, 1865, under the Act of Congress, of June 3, 1864. One of the articles of association provided that the directors might prohibit the transfer of stock without their consent. Accordingly a by-law declared that no transfer of the stock should be made without the consent of the Board of Directors, by any shareholder who was indebted to the bank and certificates of stock were to contain this provision. After the adoption of this by-law, Watts, Crane & Co., became the owners of one hundred and fifty shares of stock, and Crane, one of the firm, of fifty shares. Certificates were issued for these shares in conformity with the above by-law.

Watts, Crane & Co., did business with the Evansville National Bank, and they were indebted to the bank from the time they became holders of the stock, for money loaned upon bills drawn, indorsed, or accepted by them, in the usual course of dealing.

On the 15th of September, 1866, they borrowed $30,000 of the Metropolitan National Bank, of New York, and they and Crane delivered their certificates of stock as a pledge to secure

the money so borrowed, attaching to the certificates bills of sale with power of attorney for the transfer of the stock.

On the 15th of April, 1867, Watts, Crane & Co., became indebted to the Evansville National Bank, on an acceptance for $25,000. At this time the Evansville Bank had no notice of the pledge previously made to the Metropolitan Bank. The members of the firm of Watts, Crane & Co., were declared bankrupts by the District Court of Indiana, March 3, 1868.

The District Court held that the pledge to the Metropolitan Bank was binding, notwithstanding the by-laws under which the Evansville Bank claimed a lien upon the stock.

Drummond, J. The only question in the case is, whether this by-law was valid under the law of June 3, 1864. The 8th section of that act authorizes the Board of Directors to make by-laws, but declares they must not be inconsistent with its provisions.

The 35th section declares that no association shall make any loans, or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless to prevent loss on a debt previously contracted in good faith.

The counsel for the plaintiff, in the able argument he has presented, claims that the operation of the by-law upon the shares of stock, because of the indebtedness of Watts, Crane & Co., and their transfer to the Metropolitan Bank, without the consent of the Board of Directors, was not a loan or discount made on the security of the shares, that there must be a distinct assignment or hypothecation of the stock as security for a loan or discount made, and some authorities have been cited which seem to sustain that principle. But if a by-law declares in substance and effect, that for all loans or discounts made to the shareholder, a lien shall exist against his stock, the result would be the same as if there were a separate transaction and security given in each case. The shareholder always has the credit on the security of his stock, and thus the very object is accomplished which the 35th section sought to prevent, the absorption of the shares into the assets of the bank. And it will be observed that the law only allows the stock to be taken by the bank as security, or purchased or held to avoid loss on a debt previously contracted in good

faith, and even then the stock is to be retained by the bank only a limited time.

An extended examination of the authorities cited by counsel is unnecessary, because in the case of the First National Bank of South Bend vs. Lanier, recently decided by the Supreme Court of the United States, the question involved here is discussed by that Court and a principle established that is decisive of this case.

In that case the bank had made a by-law, declaring that the stock of the bank should be transferable only on its books subject to the provisions of the 36th section of the Act of 1863 (by which a shareholder was prevented from transferring his stock when he owed the bank). The bank sought to avail itself of this by-law, notwithstanding the repeal of the 36th section, by the Act of 1864, and the Court held that that could not be done. This was in effect, deciding that no such by-law could be in force under the provisions of the Act of 1864. The language of the Court is: "Congress evidently intended, by leaving out of the law of "1864 the 36th section of the Act of 1863, to relieve the holders "of bank shares from the restrictions imposed by that section. "The policy on the subject was changed, and the directors of "banking associations were in effect notified, that thereafter "they must deal with their shareholders as they dealt with other "people. As the restrictions fell, so did that part of the by-law "relating to the subject fall with them."

The decree of the District Court is affirmed.

The case of Feekheimer vs. The National Exchange Bank of Norfolk, Va., is so completely like the case at bar that we give it in full.

Feekheimer v. The National Exchange Bank of Norfolk, Va., 79 Va., 80.

Appeal from decree of Corporation Court of City of Norfolk, rendered 24th June, 1882, in the chancery cause wherein Martin S. Feekheimer is plaintiff and the National Exchange Bank of the City of Norfolk is defendant.

On 8th May, 1866, the firm of Lublin & Steiner, doing business in Norfolk and elsewhere, failing, conveyed by deed all

their property, real and personal, to said Feckheimer as trustee to secure certain debts, and to do whatever was necessary to effect the objects of the trust. Lublin & Steiner owned twenty shares of the stock of said bank, worth $100 a share. Trustee applied to the bank to transfer the shares to him, offering to surrender the old certificates upon the Bank's issuing new ones to him. The Bank refused on the ground that, by its by-laws no stock can be transferred by any stockholder who is liable to the Bank either as principal or debtor or otherwise, *which provision is endorsed on the certificates when issued*, and that Lublin & Steiner owed the Bank about $6,000. The object of this suit was to compel the Bank to transfer on its books the twenty shares to the trustee, and to issue to him new certificates therefor to be applied according to the provisions of the trust deed. At the hearing of the cause, the Corporation Court, considering that the plaintiff Feckheimer, had not made a case meet for the specific relief asked for in his bill, refused to compel the defendant Bank to allow the transfer on its books of the twenty shares of stock to the plaintiff, and dismissed his bill, and the latter appealed to this Court.

Harrwanson & Heath and Sharp & Hughes, for the appellant.

Wm. H. C. Ellis, for the appellee.

Lacy, J., delivered the opinion of the Court.

In the argument here the counsel for the appellee insists that the Bank was entitled to hold the stock and to refuse its transfer until its debts due by the firm of Lublin & Steiner had been paid and satisfied; and further, that however that might be, there was no jurisdiction in equity in the case, that the remedy of the plaintiff was adequate at law, etc.

The first proposition has been well settled by recent decisions of the Supreme Court of the United States. The 36th section of the National Banking Act, approved June 3d, 1864, (Section 5201, U. S. Rev. Stat.), under which act the said bank was organized, provides "That no association shall make any loan or discount on the security of the shares of its own capital stock; nor be the purchaser or holder of any such stock, unless such security or purchase shall be necessary to prevent loss on a debt previously contracted in good faith, and stock so purchased or

acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; in default thereof a receiver may be appointed to close up the business of the association according to the provisions of the Act." In passing upon this question and construing this section, the Supreme Court of the United States held in a recent case that these associations are expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to loan money on the security of its shares, it would imply also the power to become the owner of those shares, and this Congress intended to guard against. These institutions were created to subserve public purposes, and not the mere private interests of the stockholders. And in no better way could this object be attained than in placing shareholders in their pecuniary dealings with the bank on the same footing with other customers.

Whatever may have been the reason which induced the action of Congress in providing thus, the provision is plain and unambiguous, in the law, and binding on all associations organized thereunder.

The stock cannot be pledged at the time of the loan; the bank can acquire no lien upon it by express agreement at the time of the loan, nor can the bank so enact in its by-laws as to make it liable for a debt due the bank.

In this case the stock was never pledged by the debtors in question, but the certificates of stock containing on their face a provision that if the holder be liable to the bank, either as principal or otherwise, the consent of the Board of Directors should first be obtained before the transfer could be made. The bank relied upon this stipulation taken from their by-laws to enable it to subject the stock to its debt, but the provision contained in the by-laws is in contravention of the laws of Congress and is therefore void, and so far as it may apply an express agreement between the bank and its shareholder, to that effect, it is void, as

against public policy, and in its inception was a violation of law. As was held by the Supreme Court of the United States in Bank v. Lanier, 11 Wall., 369; see also Bullard v. Bank, 18 Wall., 589.

"The Court erred in its decree dismissing the bill of the plaintiffs, and the same must be reversed and annulled.

Decree reversed."

If the plaintiff in error had any lien on this stock it has held the same longer than the law allows, to-wit, six months. Section 5201 U. S. Rev. Statutes.

In Continental National Bank vs. Ellicott National Bank, Circuit Court, District Mass., April, 1884, reported in 7 Federal Reports, page 376, the Court cites the Lanier and Bullard cases and says: "The Bullard case decides that certificates of shares in National Banks are so far negotiable, or quasi-negotiable, that a by-law of the bank which undertakes to make them subject to the debt of the transferrer to the bank itself, is void."

The same doctrine is held in Orleans National Banking Association vs. S. Wilts & Company, 10 Federal Reports page 330.

All of the text writers in their late editions recognize the contention which we make, as the law. Cook on Stockholders, 3d edition, 1894, Section 533, says, "National Banks were formerly held to have power to enact by-laws, creating a lien on stock in the bank for debts owed by its owners to the bank, but the Supreme Court of the United States, when the question came before it, refused to enforce such a by-law and decided that its enactment was not within the spirit of those provisions of the Act of 1864, which conferred power upon the management of a National Bank to regulate the business of the bank and conduct its affairs."

In the present state of the law no National Bank can by any by-law create any lien upon shares of stock of the bank to secure the payment of any indebtedness which the owners of the shares may contract with the bank. This conclusion is in accordance with the well settled policy of the Federal Courts to protect purchasers of certificates of stock from all secret liens.

Jones on Liens, (1891) 2nd Ed., Sec. 384, says: "Under

the National Banking Act of 1864, a bank cannot have a lien on its own stock held by a debtor, although its Articles of Association and its by-laws are framed with a direct view to giving it such a lien; for, aside from the fact that the Act of the preceding year contained an express provision for such a lien, which was omitted in the substituted Act of 1864, it was considered that such a lien would be inconsistent with the general policy of the act which prohibits loans upon the security of shares of its own capital stock."

Thompson's Commentary on the Law of Corporations, Vol. 2, Sec. 2319, 1894 ed., says: "It has been held that National Banks organized under the National Banking Act of 1864, have no liens on the shares of their stockholders for indebtedness due from them; and that provisions framed with a direct view to that effect, in the Articles of Association of such a bank, and by-laws in pursuance thereof, are void as being incompatible with the prohibition of loans and discounts by any bank on the security of the shares of its own capital stock, and also with the repeal by that act of the provisions in the Act of 1863, that no shareholder shall have power to transfer or sell his shares, so long as he is liable for any debt due to the bank."

The American and English Enc. of Law, Vol. 16, page 201 Section 14, says: "The National Banking Act imposed special restrictions upon National Banks in regard to making loans upon the security of shares of their own stock, or purchasing such stock, and it is generally held that the by-laws of the bank cannot be so worded as to contravene such prohibition."

Sec. 15. "A National Bank cannot, according to what seems to be the present preponderating doctrine, even by provisions framed with a direct view to that effect in its Articles of Association and by-laws, acquire a lien on its own stock held by persons who are its debtors."

The same thing is in Boone on the Law of Banks, Section 236.

Paine's Banking Laws, page 533, says: "A National Bank organized and controlled by the Act of 1864, cannot acquire a valid lien upon its shareholders by the Articles of Association or by-laws, citing.

Buffalo vs. Bank, 18 *Wallace*, 597.
Bank vs. Lanier, 11 *Wallace*, *p.* 369.
Johnson vs. Lang, 103 *U. S.* 803.
Sargent vs. Franklin Ins. Co., 8 *Pick.*, 90, 96-7.
Bundu vs. Jackson, 24 *Fed. Rep.*, 628, 630.
Johnson vs. Laflin, 5 *Dillon*, 65, 73, 74.
D. L. & W. R. R. Co. vs. Oxford Iron Co., 38 *N. J. Eq.*, 340.
Feckheimer, vs. Nat. Exch. Bank, 79 *Va.*, 80.

All the authorities hold that in order to create a lien, the authority must be contained in the statute creating the corporation, or in the Articles of Association.

The creating of a lien is an extraordinary power, and the authority to create such lien must be clear. Findings XIII and XIV, Folios 22-23 are of no avail to the plaintiff in error as its articles of association and by-laws therein quoted are unauthorized. The Comptroller of the Currency at Washington had no more power to vitalize the by-laws and Articles of Association of the defendant than had the Comptroller of the Currency at Pekin.

Shares in the capital stock of associations, under the National Banking Law, are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect, however, can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the directors or other stockholders. It is not necessary, however, to consider what restrictions would be within its power, for it had imposed none. As between Laflin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the

shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors in the absence of other knowledge, are only bound to look at the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank it can be compelled, at the instance of either of them.

Johnston vs. Laflin, 103 U. S. 532, *s. c.* 5 *Dillon*, 65 and cases there cited. (Opinion Justice Field.)

The restrictions in the certificate, therefore, gave the bank no lien upon the stock.

POINT II.

The Bank, the plaintiff in error, had no Pledge of the stock.

The Bank had no actual pledge of the stock in suit as collateral for any indebtedness which Levi might have owed it. It never had possession of the stock in question; the stock was issued July 2, 1888, and given to Mr. Levi, and never returned to the Bank or placed under his control, or in any way shown to the Bank until it was taken to the Bank by the officers of the Insurance Company for the purpose of having it transferred on the books of the Bank.

It is a well settled principle at law that to make a valid pledge, there must be delivery, actual or constructive of the pledge by the pledgor or his agent, in the possesssion of the pledgee or his agent, in order to pass any right of property in the thing

pledged. To keep the pledge good, the property pledged must remain in the possession or under the control of the pledgee.

Cortelyn vs. Lansing, 2 *Cai. Cas.* 200, 202.
Garlick vs. James, 12 *Johns.*, 146.
Wilson vs. Little, 2 *Const.*, 443.
18 *Am. & Eng. Enc. of Law*, 595-598.

"A pledgee can only retain his lien by retaining possession. When he delivers up possession, his lien ceases."

Black vs. Bogart, 65 *N. Y.*, 601.

"The pledgor's possession of the pledge is prima facie evidence of fraud."

McComber vs. Parker, 14 *Pickering*, 497.

It is conceded that the Bank never had actual possession of the stock, and the only claim that it makes to any possession is found in the XV. Finding of Fact (Fol. 23,) which is based on the testimony of Mr. Sweet, President of the Bank, plaintiff in error, given on the first trial, and on the re-trial read from the Stenographer's minutes of the first trial, and recited in the statement of the case in the decision of the Court of Appeals 162 N. Y., 165.

This attempt to establish a lien by a verbal agreement between the president of the plaintiff in error and Levi is not new. It was attempted in the case of the D. L. & W. R. R. Co. vs. The Oxford Iron Company, 38 N. J. Eq., 340, where the cashier of a National Bank swore to an arrangement similar to that which Mr. Sweet swears to in this case, but the Court held that the verbal agreement supplemented by a by-law similar to the one in this case did not give the National Bank a lien on its stock.

The Bank's counsel, in his brief on the appeal to the Court of Appeals, we think, showed that the plaintiff in error never had a lien, and never intended to have a lien, on the stock for the money Levi borrowed from it. In one place he said: "It is true that the amendment of the Act of 1863 by the Act of 1864 indicates that Congress did not intend that banks should loan money upon the security of their own stock."

In another place he asked: "Is there anything in this case to show that the bank intended to claim or assert the lien when

the money was first loaned? True, the stock provided for such a lien, but the bank could waive it, and could treat the provision as one for its benefit, to be asserted only in case to prevent loss."

It is a little difficult to say, in view of these statements, how this subsequent claim of a lien could be anything but a lien for future indebtedness if, as the counsel admitted, it was not intended as security for the previous indebtedness contracted in good faith.

On another page he said: "So, too, the defendant (Bank) by paying dividends to the Levis, waived its equitable lien thereon. By not taking a formal transfer of the stock to itself, the defendant Bank never acquired a complete legal lien upon the stock of Levi. The only lien it had upon the stock of Levi was an equitable lien. The by-law and the stock itself, and the arrangement made with Levvi when the loan was made, together give the defendant an equitable lien upon the stock."

And again he said: "The debt of Levi was contracted to the Bank in good faith, and the loan to Levi was made by the Bank in good faith. *Because Levi was good at the time, the Bank was satisfied with a mere equitable claim upon the stock;* a claim and lien which it could undoubtedly enforce as against Levi and his estate. Although the Bank left the stock in Levi's hands because to take it from him would be a violation of the law, it did so knowing he could do no harm with it because the stock itself contained notice of any claim or demand the defendant might have against a stockholder."

Now we have the Bank's counsel admitting that the Act of Congress did not intend that banks should loan upon security of their own stock; asking if there is anything in the evidence to show that the bank intended to claim or assert a lien when the money was first loaned; stating that the Bank by paying dividends to the Levis, waived its equitable lien thereon, and stating that by not taking a formal transfer of the stock to itself, the Bank never acquired a complete legal lien upon the stock of Levi, and further stating that the loan by the bank to Levi was not made upon the faith of the stock, but was made because Levi was known to be good, and then asserting that the bank under

all these conditions is entitled to a equitable lien as against the Insurance Company.

Still further the counsel said "Had the defendant (Bank) said to Levi that it would loan him the money if he would assign his stock to it as security therefor, the statute would have been violated," and following he said: "As Levi did not assign his stock to the defendant (Bank), the statute was not violated by this transaction. The defendant (Bank) was loaning upon the personal security of Levi."

Can it be possible that a Court will create an equitable lien in the face of a statute positively prohibiting any lien, and in the face of an admission that such a lien, if it had been provided for in direct terms, would not have been legal, and in face of the fact that it is admitted that no lien was intended, and that it is admitted further that if any lien existed, it has been waived in part? This is what the counsel for the plaintiff in error asks the Court to do.

POINT III.

If the plaintiff in error ever had any lien upon the stock in question, either actual or constructive, it waived that lien by a failure to enforce it.

The plaintiff in error has been paying dividends on this stock all this time; Mr. Levi has drawn all the dividends on his stock up to the time of the demand by the defendant in error. From May 25, 1899, to July, 1896, would be over seven years. The plaintiff in error had declared dividends right along, and no dividend was less than six per cent. per annum; most of them had been more than that, but take it at six per cent. for seven years, the dividends would have amounted to forty-two per cent. on the stock in question, the par value of which was $15,000. Forty-two per cent. on that sum would have been $18,900.00, so that during the time that the plaintiff in error now claims it had a lien on this stock, it had paid to Levi $18,900, or more than three times the amount of its unsecured indebtedness.

Now the certificate of stock purporting to recite the by-law

under which plaintiff in error claims a lien, says that all sums for which the holder thereof shall be liable to the Association, either as principal debtor or otherwise, shall be a lien upon the said stock and *all profits thereof and dividends.*

Mr. Moot, the Counsel for the Bank, in his argument on the former appeal said: "So, too, the defendant, by paying the dividend to Levi, waives its equitable lien thereon." That was the only lien he claimed to have. So the whole lien was waived, and we say the equitable lien, if any, on the whole was waived, for the stock and the dividends were pledged, if at all, together.

If it had a lien at all, it had its lien upon the profits and dividends as well as the stock. (By-Laws, Sec. 15, p. 13, following Sec. 13, Act 1863, U. S. Stat. at Large, p. 675.) If it saw fit to pay the profits and dividends of Levi, we submit that it cannot now insist upon its lien upon the stock alone as against the Insurance Company. The taking of other security by the Bank for its debt from Levi, was a waiver of any lien, implied or otherwise.

The bank had other collateral, in the shape of stock in the Insurance Company and stock in the German Bank, of the value of about $9,000. And it appears from finding of fact No. XVII that the bank did take from Levi as security stock in the Insurance Company and in the German Bank, and the value of said security was $9,000, and that it also took as security from Levi the endorsement of J. H. Tilden and Irlbacker & Davis, both of whom were responsible.

The taking of such security under the law was a waiver of any lien that it had, or could have by implication on its stock.

Barrett vs. Goddard, 3 *Mason*, 107.
Gilman vs. Brown, 1 *Mason*, 191.
Same case, 4 *Wheat.*, 255.

POINT IV.

Levi's debt to the bank was fully paid.

The plaintiff in error has failed to show that there was any indebtedness due from Levi to it for which it could claim a lien.

Emanuel Levi the original owner of the stock died June 21,

1893, and Rosa Levi and Louis E. Levi were duly appointed executors of his estate. (Finding of Fact No. VI.) The stock was sold to the defendant in error June 30, 1896. (Finding of Fact IX.)

The indebtedness which the bank had from Levi is set forth in finding of fact XVI.

It therefore appears that Emanuel Levi owed the Bank nothing. His notes had all been retired and the Bank held notes made payable to the order of Louis E. Levi signed by

"LOUIS E. LEVI, Ex.
"ROSA LEVI, Ex."

And endorsed

"LOUIS E. LEVI,"
"ROSA LEVI."

There is no mention of Emanuel Levi, or the estate of Emanuel Levi, in the notes held by the Bank, or in the evidence of the indebtedness for which the Bank claimed to have a lien on Emanuel Levi's steel. (Finding of Fact XVI.)

If Louis Levi and Rosa Levi, his executors, borrowed money of the Bank, for which they gave their notes, the Bank could therefore acquire a lien on the stock which belonged to the estate of Emanuel Levi.

There is no proposition of law better settled than that personal representatives may bind themselves, but that they cannot, even by special contract for the benefit of the estate, bind the estate or create a lien on the estate. This doctrine is laid down by the Court of Appeals in Austin vs. Monroe, 47 N. Y., 360, and has been followed ever since without change.

All of the paper now held by the Bank, and for which it claims to hold the stock as security, is the paper of Rosa Levi and Louis Levi and, therefore, cannot be secured by any alleged lien on this stock.

POINT V.

The decision reached by the Court of Appeals (162 N. Y., page 168) in which Mr. Justice GRAY wrote the opinion, should

stand. Every point raised by the counsel on either side was fully considered in the opinion of the Court by Mr. Justice GRAY, and we have not undertaken in the argument of this case to add anything to what Mr. Justice GRAY said, or to the reasons that he then advanced for the decision of the Court.

In the argument of this case in the Court of Appeals counsel for the Bank quoted the 35th Section of the Banking Act to the effect that "No association shall make any loan or discount on the security of the shares of its own capital stock nor be the purchaser or holder of any such shares *unless such security or purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith.*"

In the opening paragraph of this Point he states that Levi made a contract with the bank for a lien on his stock in the bank in case he should decide to become a borrower; that thereafter he did become a borrower to the extent of Thirty-one thousand dollars; and that for that amount the bank had a lien on his stock. It is difficult to see how from such a statement the counsel can claim that the lien which he seeks to enforce in favor of the bank was for a past indebtedness, or was secured to prevent a loss upon a debt previously contracted, because he says that Levi did not become a borrower until after he had made the contract with the bank that the bank should have a lien.

Defendant's counsel then proceeded further in his Points to assert than after the Thirty-one thousand dollars had been borrowed by Levi he desired to obtain a further amount and so reaffirmed his understanding that the lien contracted for his past due indebtedness should be extended and a new loan of Twelve thousand dollars made upon the strength of his re-affirmation and verbal pledge of the stock. He requested the Court to find that the making of that new loan was partly upon the faith of a verbal pledge of this stock as security for the new loan, although he admits the stock was not present or in any manner delivered as security for the pretended lien. The finding of the Court is (record, p. 13) "That on the 1st day of October, 1890, the said Emanuel Levi was indebted to the defendant in the sum of Thirty-one thousand dollars, which had existed, in whole or in part, since May 1st, 1890, and *as security for the payment there-*

of, the said defendant held promissory notes of the said Emanuel Levi. That upon the first day of October, 1890, the said Emanuel Levi applied for a further loan of Twelve thousand dollars, and proposed *to secure the same by note made by himself and endorsed by his son Louis Levi,* and to treat and consider as delivered to the defendant the stock which he owned in the defendant corporation, and which was then in the safe deposit vaults of the Buffalo Loan & Trust Company as security for the payment of the said indebtedness of Thirty-one thousand dollars, and the loan that day made; and that thereupon, and in reliance upon such further and additional security for the payment of the indebtedness and the endorsement of the paper of the said Emanuel Levi of Twelve thousand dollars by his son, Louis Levi, the said defendant made the said loan of Twelve thousand dollars, and extended the time of payment of the Thirty-one thousand dollars old indebtedness."

So that if it is of any moment at all the counsel has proven by his argument in his first Point that the lien he claims, if created at all, was not created to secure a past due indebtedness, but was created to secure future advances; if it was created, by the words in the by-laws and printed on the certificate, it was to secure future advances, which he claimed had amounted to Thirty-one thousand dollars; and if it was created by the verbal pledge, it was created to secure the future advance of Twelve thousand dollars, on the additional security, of course, of the endorsements therein mentioned.

On this appeal the counsel for the appellant has seen fit to eliminate all the evidence, even the evidence upon which he bases the finding of the indebtedness of Levi to the Bank of Thirty-one thousand dollars, and the evidence of the alleged verbal pledge or the "re-affirming of the lien," as he calls it, for the Twelve thousand dollar loan.

There is perhaps a reason for this omission contained in the last paragraph of the fourth page of the brief of the plaintiff in error.

It is not a fact however that the trial judge has found the fact quite fully and more favorably to the Bank than on the former

trial. The Court of Appeals on the second argument so held and we have shown in this brief at page 2 all the changes made in the findings except the conclusions of law which were in favor of the Insurance Company instead of the Bank.

In the statement of the case contained in the report of the case 162 N. Y., at the bottom of page 165, is the following statement: "It is also claimed that he orally stated to the defendant's president that he had a large amount of stock in the bank and that was security for his loans, and that though it was in the safe deposit vault the bank could consider it there as delivered as collateral to its loan. The Trial Court made no findings as to these facts; nor otherwise upon the subject in the finding above given." This language is no part of the opinion of the Court, but on the re-trial of the case the counsel read from the testimony on the former trial the testimony of Mr. Sweet on this point, and on that testimony, which was uncontradicted, asked the Court to make the finding which it did make. The evidence upon which the finding was made was all before the Court of Appeals on the first argument in exactly the same shape it was in before the Trial Judge on the re-trial.

There should be no force given to this finding which was not given to the evidence itself on the former appeal, and which was exactly the same, and uncontradicted.

The counsel for the plaintiff in error in his first point says the justice of the Bank's claim is clear, and cites from the Fourteenth Finding, page 13, the by-law giving it a lien upon the stock and all profits therefor. It never undertook to enforce this lien, because from the time the stock was issued to Mr. Levi in 1888 down to the time when the Insurance Company purchased the stock, July 1, 1896, the Bank had paid all the profits and dividends on said stock to Levi or his estate (Folio 26, page 15).

The lien, if any, which the Bank could claim, was a lien *upon the stock, its profits and dividends, and the payment by the Bank of the profits and dividends to Levi* during all this time was certainly a waiver of any possible claim the Bank might have had (105 U. S. 221).

Levi during all these times up to the date of his death was a Director in the Bank.

The counsel says in his brief (p. 30), "As the Insurance Company is sure of the stock in any event, why should the Bank not be permitted to retain dividends enough to pay it, in exact accordance with the agreement of Levi, and with the understanding evidenced by the certificate of stock itself?" The answer is clear and simple. First—It has no right to retain such dividends; and Second—If it had such a right, it voluntarily refused to exercise it, and voluntarily paid its dividends to Levi in a sum far greater than the amount of its alleged indebtedness. All the while that it claimed to have a lien on this stock and its profits and dividends, it was voluntarily paying those profits and dividends to Levi, and, as we have said, the amount thus voluntarily paid more than trebled the amount for which it now claims it has a lien on said stock.

The counsel for the plaintiff in error cites at great length the case of Knight vs. the Old National Bank, decided in Rhode Island District, June Term, 1871, by Mr. Justice CLIFFORD, (3 Cliff. 429,) but he does not cite from the opinion of the Justice, page 435 and page 436,—holding that there must be express authority for the enactment of such a by-law contained in the charter of the Bank, or in the Act under which it was created. The doctrine of the Knight case is expressly disapproved by this Court in Johnston vs. Laflin, 103 U. S. 534. See opinion of Justice FIELD therein herein before quoted.

In Knight vs. The Bank, the by-law did not contain any such provision as the by-laws of the plaintiff in error contain: "Which liability shall be a lien upon the said stock and all profits thereof and dividends." (Page 11.) The Bank's refusal to transfer the stock was solely upon the ground that Levi was indebted to it and that by reason of the by-law and the notice on the certificates of stock it had a lien on the stock for the amount of Levi's indebtedness and that when that was paid it would transfer the stock. In the answer to the original complaint in this action, (p. 8, Fol. 13,) the Bank alleges that at the time of the sale of Levi's stock to the Insurance Company Levi was indebted to the Bank in a large sum of money; that the sum of sixteen

thousand three hundred and fifty-seven and 99-100 dollars ($16,357.99) and interest from the 27th of August, 1896, was still due to it; that the Bank had a lien on all of Levi's stock to that amount, and (p. 9, Fol. 14) that plaintiff's (the Insurance Companny's) lien, if any, is inferior and subsequent to the claim or lien of the defendant (the Bank).

The decision of the Supreme Court on the first trial was in favor of the Bank, and the conclusion reached upon the facts was in substance that the defendant Bank had a lien upon the stock for the amount of the indebtedness existing against the estate of Levi when the certificates were purchased by the Insurance Company, and that the latter's right to a transfer to itself of the stock was subject to the lien of the Bank, and the judgment was that the plaintiff was entitled to a transfer of the stock in question by the Bank and to have new certificates issued to it in place of those to be surrendered and cancelled, when, but not until plaintiff (the Insurance Company) should pay to the Bank an amount sufficient to satisfy its lien for the indebtedess to it owing by Levi's estate. Buffalo German Insurance Company vs. Third National Bank, 162 N. Y., p. 166. The only question in the pleadings, on the trial, and in the decisions is whether the Bank had a lien on Levi's stock for the amount of his indebtedess to the Bank. The refusal of the Courts below to allow the lien of the Bank upon the stock for the amount of its advances is asserted by Counsel for plaintiff in error (p. 6 of his brief), to be the essence of the fifth, sixth, seventh, and eighth assignments of error.

It is the concluding cry of counsel for plaintiff in error set out on page 30 of his brief: "As the Insurance Company is sure of the stock in any event, why should the Bank not be permitted to retain dividends enough to pay it, in exact accordance with the agreement of Levi, and with the understanding evidenced by the certificate of stock itself?" The case of Knight vs. Old National Bank, 3 Cliff., 429, is not in point.

The counsel also cites Brent vs. Bank of Washington, 10 Peters, 615. This case arose under facts which occurred in 1820, and under the provisions of the Act of 1797, which permitted such by-laws to be made, as did the Act of 1863; but the

force of these decisions dies with the repeal of those Acts and the enactment of 1864 and the amendments thereof. This case had no bearing whatever in the case at Bar.

On page 4 the Counsel for plaintiff in error recites the fact that Levi had transferred to the Insurance Company all of the certificates mentioned, with an assignment and receipt as *Collateral Security*, and says that they were not then in fact *transferred on the books of the Bank*, and says the contrary is found; and then recites the 18th Finding of fact,—that plaintiff did not at any time until June 30, 1896, demand a transfer of said stock or the payment to it of any dividend thereon. The stock being assigned to the Insurance Company as *collateral to its loan*, it could not have the same transferred on the books of the Bank until some default had been made and the collateral had become by a legal process the property of the Insurance Company. There was no default, and therefore no right of the Bank to transfer until after the default which gave rise to the sale of June 30, 1896, on which sale the Insurance Company became the purchaser of the stock. It then demanded a transfer, producing proofs of the sale and its title to the stock, and demanded that dividends should be paid to it thereafter.

The counsel for the plaintiff in error relies on the cases of National Bank vs. Matthews, 98 U. S. 621, and s. c. 8 Otto, 621-630, and National Bank vs. Whitney, 103 U. S. 99, and s. c. 13 Otto, 99-104, to overcome the case of Bullard vs. Bank, 18 Wall. 594, and Bank vs. Lanier, 11 Wall. 369. Mr. Justice Gray writing the opinion of the Court of Appeals in Buffalo German Insurance Company vs. Third National Bank, 162 N. Y., page 163-171, etc., differentiates between these two classes of cases and shows that they are not at all in conflict; that they arise on entirely different conditions and decide very distinct propositions of law. While we regard all these cases as good law, Mr. Justice Miller dissented in the Matthews case, and Justices Miller and Harlan dissented in the Whitney case. The strongest confirmation that this class of cases are not antagonistic is found in the fact that nowhere in the briefs of counsel or opinions of the Court in the Matthews or Whitney cases are the Bullard or Lanier cases, or either of them, cited or referred to.

The Insurance Company, in asking this Court to affirm the judgment of the Court of Appeals of the State of New York, is simply asking it to affirm its own decisions in the Bullard and Lanier cases, which have stood without question ever since they were rendered, have been cited, approved and followed in the United States Courts, in the Courts of various States, and in all the text books on Banks and Banking, and the powers of National Banks, without exception.

POINT VI.

It follows, therefore, that the judgment of the Supreme Court of the State of New York, and of the Court of Appeals of the State of New York, should be affirmed, and that this case should be remanded to those Courts with directions to enter a decree accordingly.

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Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 146.

THE THIRD NATIONAL BANK OF BUFFALO, N. Y.,
PLAINTIFF IN ERROR,

vs

THE BUFFALO GERMAN INSURANCE COMPANY.

SUPPLEMENTAL BRIEF FOR THE BUFFALO GERMAN INSURANCE COMPANY, THE DEFENDANT IN ERROR.

We wish to ask the Court's attention to a brief resume of the cases cited by the respective parties on this argument, for the purpose of emphasizing the claim made in behalf of the Defendant in Error that the cases cited by the counsel for the plaintiff in error belong to a class of cases which are recognized by all the text-book writers on the subject to which they relate, but which are classed under a different head and under different principles from those cases cited on behalf of the defendant in error.

The facts in none of the said cases are parallel or similar to the facts in this case, and it may be conceded that they are good law without at all affecting the claim herein of the defendant in error.

In the case of the *First National Bank of Xenia*, Ohio, vs. *Stewart* and *McMillan*, administrators, 107 U. S., 676, the bank had taken thirty shares of its own stock, which had been

issued to the defendant's testator and held the same as security for a debt due from him to the bank. Default having been made, the bank sold the stock and applied the proceeds to the payment of its debts. The administrators sued the bank to recover the amount of the proceeds of the sale, on the ground that the bank had no right to take the security; it being prohibited from so doing by the Act of Congress.

Mr. Justice FIELD in rendering the opinion of the Court says:

"While this section in terms, prohibits a banking association from making a loan upon the security of shares of its own stock, it imposes no penalty, either upon the bank or borrower, if a loan upon such security be made. If, therefore, the prohibition can be urged against the validity of the transaction by anyone except the government, *it can only be done before the contract is executed,* while the security is still subsisting in the hands of the bank. It can then, if at all, be invoked to restrain or defeat the enforcement of the security. When *the contract has been executed,* the security sold, and the proceeds applied to the payment of the debt, the Courts will not interfere with the matter. Both *bank* and *borrower are in such case equally the subjects of legal censure,* and they will be left by the Courts where they have placed themselves.

There is another view of this case. The deceased authorized the bank, in a certain contingency, to sell his shares. Supposing it was unlawful for the bank to take those shares as security for a loan, it was not unlawful to authorize a bank to sell them when the contingency occurred. The shares being sold pursuant to the authority, the proceeds would be in the bank as his property. *The administrators, indeed affirm the validity of that sale by suing for the proceeds.* As against the deceased, however, the money loaned was an offset to the proceeds. In either view the administrators cannot recover."

The Court thus shows that where there is an executed con-

tract, the parties to which have been equally guilty of breaking the law, the one in borrowing money on a security which the bank had no right to take; and the other, in loaning money on a security which it had no right to take, that the law would leave them where they had placed themselves, and would afford neither a remedy as against the other for their illegal acts; but in this case the Court suggests the second way out of the difficulty which would relieve the bank from any illegal act and make its sale of the stocks which it held a valid transaction.

In the case of *Union National Bank vs. Matheus*, 98th U. S., 621, the bank was not a direct party to the original transaction of the giving of the mortgage. In that case the payee of a note who held a trust deed as security for the payment of a note borrowed on his own note certain moneys from the National Bank and assigned to the bank as security for the payment of the same the note which he held and the trust deed; and on default being made in the payment of his note, the bank sold the land under the deed of trust, and the Court held that it had the right to do so. *The bank had actual possession of the trust deed or mortgage*, and obtained it in such a way that it would seem that it should have the right to sell the property and satisfy its debt; however, so good a justice as Mr. Justice MILLER dissents from the opinion of the Court upholding that right in the bank.

In the case at bar the testimony shows that the loan to Levi was made upon the faith of Levi's ability to pay, as he was known to be good, and not upon the alleged lien of the stock. *The bank did not have the stock;* and therefore, it is not called upon to surrender the stock as it never had it to surrender.

In this particular the case at bar differs from every case cited by the counsel of the plaintiff in error.

The case of *Thomas vs. St. Nicholas Bank*, 146 U. S., 240 is not a case in point. That was an action on a check which had been over-certified, in violation of the provisions of the Revised Statutes. The same statute which prohibits the over-certifying

of checks by banks, provides that "a check certified by a duly authorized officer of the bank when the customer had not on deposit an amount of money equal to the amount specified in the check certified, shall, nevertheless, be a good and valid obligation against the bank."

In the case of the *National Bank of Genesee* against *Whitney*, 103 U. S. 99, *the bank had possession of the mortgage* which it held as security for the loans it might make to Whitney; and it sought to enforce its claim against the surplus monies arising on a foreclosure under a prior mortgage. The bank held this mortgage as security for future loans, and when the case was before our Court of Appeals in the 71st N. Y. page 161, this Court held that the mortgage was void; but the Supreme Court of the United States reversed the decision. My colleague, on the first argument before the Appellate Division, Mr. Theodore Bacon, argued the *Whitney* case in the Supreme Court of the United States, and knew all of the questions involved thoroughly; and did not hesitate in the court below nor would he in this court, had he lived to be here, fail to proclaim the broad difference between the *Whitney* case and the case at bar; the one being a case to enforce a lien under a mortgage which the bank had taken as security for its loan; and the other being to create a lien in favor of the bank where it had not possession. It is *malum prohibitum*, and recognized as such by every Court that has passed upon the subject.

The *Whitney* case must be considered as decisive of the questions involved in it, this Court having decided it; yet in this Court Mr. Justice MILLER and Mr. Justice HARLAN dissented.

Knight vs. The Old National Bank, 3 Cliff., 429, and the long list of cases cited therein, which are also cited by the counsel on pages 10, 11 and 12 of his brief, is a case in the Circuit Court, Rhode Island District, decided in June, 1871. It simply decides that a National Bank may by a by-law prohibit the transfer of its stock by a stockholder indebted to it if it does not undertake to create a lien for the amount of its indebtedness upon the stock. This case was disapproved in Bullard vs.

The Bank, 18 Wall., 589-598, when Mr. Justice CLIFFORD dissented from the Bullard case because of the opinion he had expressed in the case of Knight vs. the Bank. The case was further practically overruled in Johnson vs. Laflin, 103 U. S., 800-806, when Justice FIELD, writing an opinion said, that "under the pretense of prescribing the manner of a transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the Directors or of the stockholders." The case is not only overruled, but is not in point, for the reason that even if it were good law, the by-law is not the same as the by-law in this case, in that here the by-law provides that there shall be a lien upon the stock for the amount of the stockholders indebtedness.

Moore vs. The Bank, 111 U. S., 163-166, is a case that holds a Bank is not liable for stock fraudulently issued by its secretary and is not at all in point.

Union Bank vs. Laird, 2 Wheat., 390, arose under the Statute of 1811 and is not in point.

Brent vs. Bank of Washington, 10 Peters, 615, arose under the Act of 1797, and has nothing to do with the questions in this case.

This review of the cases cited by the plaintiff in error shows that the first, *The National Bank of Xenia, vs. Stewart*, is the only one that touches on the subject of this litigation. And there the question was decided on other grounds. The administrators having affirmed the sale of the stock sued for the proceeds. And the Court held them too late to avail themselves of any invalidity in the pledge.

In the *Union National Bank vs. Mathews*, the question involved arose on a mortgage which the bank *had taken*.

In *Thomas vs. St. Nicholas Bank*, the question involved arose on the over-certification of a check.

In the *Whitney* case the question arose out of a mortgage taken by the bank. *So that none of these case are pat.*

ON THE OTHER HAND,

every case cited on behalf of the defendant in error arose on facts which were similar, and in several cases identical with the case at bar.

They all deal with the question of the power of a bank to enforce a lien which it claimed on its own stock.

In the first place the Text Writers are cited at page 19 of the defendant's in error brief—all on the point at issue in this case —that a national bank cannot acquire a lien on the stock of its stockholder by by-laws or notices.

Then come the cases, every one of which is *pat.*

The case of *Feckheimer vs. The National Ex. Bank of Norfolk, Va.*, 79-80, which is in all but names of parties the identical case in issue. It will be found in full at page 16 et. seq. of brief for defendant in error.

Also, *Evansville National Bank vs. Metropolitan National Bank*, 2 Bissell's R. 527. Set out in full at page 14.

Bank vs. Lanier, 11 Wallace 369-378.

Bullard vs. Bank, 18 Wallace 589-598.

2nd National Bank of Louisville vs. State Bank of New York, 10 Bush (Ky.) 367-375.

Conkling vs. 2nd National Bank of Oswego, 45 N. Y. 655.

Driscoll vs. The West, Bradley and C. M. Co., 59 N. Y. 96.

Continental Bank vs. Eliot National Bank, 7 Fed. Rep. p. 376.

Orleans National Bank vs. B. S. Wills & Co., 10 Fed. Rep. 330.

So far as I know, none of these cases have been criticised, distinguished or reversed.

They do not conflict with the other cases of the *Whitney* class.

The contention of the defendant in error is supported by reason and upheld by authority strong and unequivocal, and we believe the judgment herein should be affirmed.

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Supreme Court of the United States.

No. 146.—October Term, 1903.

The Third National Bank of Buffalo, N. Y., Plaintiff in Error, vs. The Buffalo German Insurance Company. } In error to the Court of Appeals of the State of New York.

[April 4, 1904.]

The Third National Bank of Buffalo, spoken of hereafter as the bank, was organized on the 9th of February, 1865, and its articles of association contained the following:

"That the board of directors shall have power to make all by-laws that may be proper and convenient for them to make under said act for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to the association either as principal debtor or otherwise without the consent of the board."

In virtue of the authority assumed to be conferred by the foregoing provision, the board of directors adopted in February, 1865, a by-law as follows:

"Transfers of Stock.—Sec. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfers of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all the profits thereof, and dividends and certificates of stock shall contain upon them notice of this provision."

Pursuant to this by-law the stock certificates of the bank were thus framed:

"This is to certify that ——— is the owner of ——— shares of one hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien or liens referred to in section 15 of the by-laws of said bank, in the following words: 'No transfer of the stock of this association shall be made without the consent of the board of directors, by any stockholder, who shall be liable to the association either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And the said stock is transferable only on the books of the bank by him or his attorney on the surrender and cancellation of this certificate and compliance with the said by-laws."

Emmanuel Levi became the registered holder and owner of 450 shares of the capital stock, evidenced by certificates, in the form just stated. Levi borrowed money from the bank upon his promissory notes, secured by various collaterals. On the first day of October 1890, he applied for a further loan, which the bank agreed to make, provided the new loan was endorsed by Louis Levi, a son of Emmanuel. At that time, in a conversation between the president of the bank and Levi, it was understood that all the stock held by Levi in the bank should be considered as additional security for his entire loan. When this conversation took place, however, the certificates evidencing Levi's stock were in his possession, and no formal pledge or subsequent delivery of the certificates of stock to the bank took place.

A few months after (on December 3, 1890) Emmanuel Levi borrowed $25,000 from the Buffalo German Insurance Company, hereafter spoken of as the insurance company, and secured this loan by pledging, delivering, and assigning to the insurance company his certificates of stock in the bank. The written contract of pledge gave the insurance company power, in default of payment of the loan at its maturity, to sell the stock at public or private sale after notice and apply the proceeds to the debt. On August 13, 1891, and on May 5, 1892, Levi borrowed additional sums from the insurance company and secured these loans by a pledge and assignment of his remaining stock in the bank. These contracts of pledge also contained a power of sale similar to that conferred by the first contract. In June, 1893, Emmanuel Levi died, and Louis and Rosa Levi were appointed and qualified as his executors. On the 9th of June, 1896, there was due to the insurance company on the notes of Levi, secured by the pledge of his stock as above stated, the sum of $55,000 of principal, with certain unpaid interest. On that date the insurance company served upon the executors of the estate of Levi a demand for the payment of the debt, accompanied with a notice that if payment were not made the stock would be sold and the proceeds applied to the debt. Payment not having been made, after adequate notice, the attorneys for the bank, the attorneys of the executors of Levi, and one of the executors being present, the stock was sold at public auction, and was bought by the insurance company for the sum of $44,000, that being the highest bid offered. The insurance company thereupon presented to the bank the certificates of stock, the assignment thereof and the evidence of the purchase at auction, and demanded a transfer to its name. This the bank refused on the ground of Levi's indebtedness to it. Subsequently the insurance company filed its bill, praying that the bank be decreed to transfer the stock and pay the dividends which had accrued thereon since the date of the demand to transfer. The bank by its answer set up the debt due by Levi to it, asserting

that under the provision of its articles of association and by-laws, as well as under the terms of the certificates of stock and the agreement with Levi, it had the right to apply the dividends on the stock, accrued since the purchase by the insurance company, to its debt, and, indeed, having a prior lien upon the stock for its debt, had the right to withhold the transfer of the stock until the debt due it by Levi or his estate was paid. There was a decree in the trial court in favor of the bank. The case was appealed by the insurance company to the appellate division of the Supreme Court, fourth department, in which court the judgment of the trial court was affirmed. (29 Appellate Division, 137.) The insurance company prosecuted its appeal to the Court of Appeals of the State of New York, and in that court the judgments below were reversed and the case was remanded for further proceedings. (162 N. Y. 168.) The cause was again tried and resulted in a decree in favor of the insurance company in both the trial court and the appellate division of the Supreme Court, and these judgments were affirmed by the Court of Appeals on the authority of its previous opinion. It is to review such decree of affirmance that this writ of error is prosecuted.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

It is obvious that the bank had no lien on the stock of Levi as the result of an express contract of pledge. The mere statement by Levi in a conversation with the president of the bank when the last loan was made to him, that his stock was a security to the bank, did not amount to a pledge of such stock, as there was no delivery of the certificates. As tersely said by the court below:

"If we assume the existence of a contract between the defendant bank and Levi, (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans,) it was executory in its nature as long as the stock remained in his possession and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge in order to raise a privilege against third persons. (*Casey* v. *Cavaroc*, 96 U. S. 467; *Wilson* v. *Little*, 2 N. Y. 443.)"

We may, therefore, at once lay out of view the provisions of section 5201, Revised Statutes, prohibiting a national bank from making any loan or discount on the security of its shares of stock, and forbidding the purchase or holding by a national bank of such shares of stock, unless necessary to prevent loss on a debt previously contracted in good faith. And putting these provisions aside, we may also pass the consideration of the decisions of this court construing the provisions in question, and holding

that they may not be availed of by a debtor of the bank to defeat the enforcement of obligations by him contracted in favor of the bank. (*Bank* v. *Matthews*, 98 U. S. 621; *Bank* v. *Whitney*, 103 U. S. 99; *Thompson* v. *Bank*, 146 U. S. 240.) This brings us to the real question in the case which is, the validity and effect of the provisions of the charter and by-law of the bank forbidding a transfer of stock where the stockholder was indebted to the bank and the insertion of a condition to the same effect in the certificates of stock which were held by Levi, and which he delivered to the insurance company, as collateral, when he borrowed money from that company. If those provisions were valid it is obvious that the insurance company took the stock subject to the paramount right which the bank possessed. If, on the other hand, the condition in question was void because repugnant to the text of the national bank law and in conflict with the public policy which that act embodies, it is equally clear that there was no lien in favor of the bank, and the title of the insurance company, derived from its pledge and purchase, was paramount to any assumed right of the bank to refuse to transfer the stock in order to enforce a lien which, it was asserted, the bank possessed as a result of the condition in question. That the provisions referred to were void because coming within the last mentioned category will become apparent from a brief consideration of the national bank law found in the Revised Statutes, as elucidated by its evolution from the acts of 1863 and 1864, and as expounded by the previous decisions of this court.

National banks were first created by the act of 1863. (12 Stat. 665.) By section 36 of that act it was provided:

"That the capital stock of any association formed under this act shall be divided into shares of $100 each, and shall be assignable on the books of the association in such manner as its by-laws shall prescribe; but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety or otherwise, to the association for any debt which shall have become due and remained unpaid, nor in any case shall such shareholder be entitled to receive any dividend, interest or profit on such shares so long as such liabilities shall continue, but all such dividends, interests and profits shall be retained by the association and applied to the discharge of such liabilities; and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association."

Section 37 of the same act provided that—

"No banking association shall take, as security for any loan or discount, a lien upon any part of its capital stock, . . . and no such banking association shall be the purchaser or holder of its capital stock or of the capital stock in any other incorporated company, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith on security which, at the time, was deemed adequate to insure

the payment of such debt, independent of any lien upon such stock; or in case of forfeiture of stock for the non-payment of installments due thereon, and stock so purchased or acquired shall in no case be held by such association so purchasing for a longer period of time than six months, if the same can, within that time, be sold for what the stock cost."

The act of 1863 was expressly repealed (sec. 62) by the act of 1864 (13 Stat. 99.) The repealing act, however, contained the following:

"*Provided*, that such repeal shall not affect any appointments made, acts done or proceedings had, or the organization, acts or proceedings of any association organized or in process of organization under the act aforesaid."

The act of 1864, which contained a repealing clause subject to the foregoing proviso, re-enacted in completer form the entire law as to national banks The subjects which had been embraced by section 36 of the act of 1863 were contained in section 12 of the act of 1864, in part, as follows:

"The capital stock of any association formed under this act shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; . . ."

The remaining provisions of the section related solely to the double liability of the shareholders. It hence follows that all the provisions found in section 36 of the act of 1863, empowering the board of directors of a national bank to withhold a transfer in case of a debt due by a stockholder to a bank, were not only omitted from the new act, but were expressly repealed. The provision found in the thirty-seventh section of the act of 1863, prohibiting an association from making any loan or discount on the security of the shares of its own capital stock, was re-expressed in a substantially identical, though somewhat more amplified, form of statement in section 35 of the new act. The provisions of the act of 1864, in the particulars in question, are now embodied in sections 5139 and 5201 of the Revised Statutes.

When this history of the legislation is considered it becomes apparent that the clause inserted in the articles of association, in the by-laws and the certificates of stock of the bank here being considered was directly repugnant to the act of 1864, and amounted simply to an attempt on the part of the bank to exercise the power which was granted under the act of 1863, but which was denied by the act of 1864. And this result was long since pointed out by the decisions of this court. In *Bank* v. *Lanier*, (11 Wall. 369,) the case was this: The First National Bank of South Bend was organized under the act of 1863. A by-law of the bank provided that "the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the act of Congress." Culver became a stockholder in the bank, certificates having been issued to him as such, stating on their face the limitations on the power to transfer expressed in the by-

law just referred to. By an agreement between Culver and the bank it was understood that his stock in the bank should secure the bank against any loss resulting from a deposit of its funds made by the bank with the house of Culver, Penn & Co., of New York, of which Culver was a member. When, however, this agreement was made the certificates of stock were not delivered to the bank, but remained in the possession of Culver. After the passage of the national bank act of 1864, Culver, in violation of his agreement with the bank, sold his stock and delivered the certificates thereof, with power to transfer the same to Lanier and Handy, who requested a transfer of the same. This the bank refused to do on the ground of Culver's agreement, and on the further ground of the provision in the by-law and certificates, which, it was asserted, but expressed by reference the provisions of the thirty-sixth section of the act of 1863. Two questions were necessary to be decided: *a*, the right of the bank resulting from the understanding with Culver; and, *b*, its right arising from the terms of the by-law and certificate. These questions were ruled adversely to the bank. It was held that the agreement between the bank and Culver was void because it was within the prohibitions of both the thirty-seventh section of the act of 1863 and the thirty-fifth section of the act of 1864, prohibiting a national bank from loaning on the security of its own capital stock, etc. Irrespective, however, of this question, it was expressly decided that, as the act of 1864 had repealed the provision of the act of 1863, subjecting transfers of stock in national banks to debts due by the stockholder to the bank, or permitting the board of directors to provide to that effect, the result of the act of 1864 was impliedly to prohibit a bank from imposing such a condition on the transfer of stock. And the doctrine was applied to a by-law adopted prior to the passage of the act of 1864, because it was held that the continued operation of such a by-law was prevented by the act of 1864, as the right to continue it was not saved by the proviso to the repealing clause of that act. It was pointed out that the provision of the act of 1864, making the stock of national banks transferable like other personal property, was a fundamental departure from the act of 1863, and was based on a rule of public policy initiated by the act of 1864, intended to afford facilities for the transfer of stock in national banks, and thereby to encourage investment in such stock. The same subject was considered in *Bullard* v. *The Bank*, (18 Wall. 589.) There a by-law and form of certificate, adopted after the enactment of the statute of 1864, reserving the right to refuse to transfer stock in a national bank where the stockholder was indebted to the bank, was again determined to be *ultra vires*, because in conflict with the act of 1864, and such a provision was decided to be inoperative even as against the assignee in bankruptcy of the stockholder. These cases foreclose every question presented on this record. The cases have been fre-

quently referred to approvingly. (*Earle* v. *Carson*, 188 U. S. 42, and authorities there cited.) The contention that, although the condition in the certificate was void, nevertheless it operated as a notice to the insurance company, and thereby deprived it of its right to compel the transfer of the stock, but asserts in another form that there was power, by the insertion of such a condition in the certificate of stock to deprive the stock of a national bank of its attribute of sale like any other personal property. The extension wholly ignores not only the text of the law, but the rule of public policy which the national bank act has been decided to embody.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.